NEGOTIABLE INSTRUMENTS

American Institute of Banking

Section American Bankers Association

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PREFACE

AS is stated in the preface to the text-book "Commercial Law," the Institute courses in law are not intended to make lawyers, but simply to impart to bankers sufficient knowledge of law to enable them to act in accordance with established legal principles and to refer doubtful questions to a lawyer. Of all the topics embraced in these law courses, that of Negotiable Instruments is perhaps the most important for the banker. This text-book is based on the excellent work originally prepared for the Institute by Samuel Williston, Weld Professor of Law in Harvard Law School. The former text has been doubled in size and undergone certain changes in arrangement. The Negotiable Instruments Act, the Bible of the law merchant, will now be found at the end of the book instead of distributed through the text as heretofore. It is referred to so constantly by the student that greater ease in referring to sections by numbers is desirable than was possible in earlier editions. Bankers may wonder why certain topics with which they are familiar are not touched upon in this book. It must be remembered that this is a text-book on law and not on banking practice, and that frequently common matters in banking practice have never been brought before the courts for adjudication. The absence of decisions on many such topics is thus explained. Several of the legal opinions contained in this book have been taken from the "Digest of Legal Opinions" of Thomas B. Paton, General Counsel of the American Bankers Association, compiled by Thomas B. Paton, Jr. The work of preparing "Negotiable Instruments" has been done jointly by Richard D. Currier, President of New Jersey Law School, and Richard W. Hill, Member of the New York Bar and Secretary of the American Institute of Banking. This book discusses each section of the Act separately and thoroughly, and is replete with practical illustrations.

INSTITUTE PLATFORM

RESOLUTION adopted at the New Orleans Convention of the American Institute of Banking, October 9, 1919:

"Ours is an educational association organized for the benefit of the banking fraternity of the country and within our membership may be found on an equal basis both employees and employers; and in full appreciation of the opportunities which our country and its established institutions afford, and especially in appreciation of the fact that the profession of banking affords to its diligent and loyal members especial opportunities for promotion to official and managerial positions, and that as a result of the establishment and maintenance of the merit system in most banks a large number of Institute members have through individual application achieved marked professional success, we at all times and under all circumstances stand for the merit system and for the paying of salaries according to the value of the service rendered.

"We believe in the equitable cooperation of employees and employers and are opposed to all attempts to limit individual initiative and curtail production, and, insofar as our profession is concerned, are unalterably opposed to any plan purporting to promote the material welfare of our members, individually or collectively, on any other basis than that of efficiency, loyalty and unadulterated Americanism."

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WHO IS A BANKER?

A SUCCESSFUL BANKER is composed of about one-fifth accountant, two-fifths lawyer, three-fifths political economist, and four-fifths gentleman and scholar—total ten-fifths—double size. Any smaller person may be a pawnbroker or a promoter, but not a banker.—George E. Allen.

Negotiable Instruments

INTRODUCTION

NEGOTIABLE PAPER DEFINED.—By the term "negotiable paper" we ordinarily mean promissory notes, bills of exchange and checks. Some writers mention the first two only, a check being merely a form of a bill of exchange. In fact, the Negotiable Instruments Law defines a check as a bill of exchange drawn on a bank. During the last few years the principles of negotiability have been applied to a number of other documents and the student of commercial law should supplement his study of the law of bills and notes by a brief consideration of them. For example, the Uniform Stock Transfer Act applies the principles of negotiability to stock certificates. The same is true of the Uniform Bills of Lading Act and the Uniform Warehouse Receipts Act. The trade acceptance, the use of which has been revived within the last few years, adds another document possessing the ordinary qualities of negotiability. We shall consider briefly all of these, after our discussion of the general principles of the law of bills and notes.

THE ORIGIN OF NEGOTIABILITY.—The law governing negotiable paper originated among the customs of merchants on the continent of Europe. It was gradually introduced into England and its principles grudgingly recognized by the common law

judges. It was not until 1666 that an English court in the case of Woodward V. Rowe, 2 Keb. 105, 132, declared that "The law of merchants is the law of the land, and the custom is good enough generally for any man, without naming him merchant." Lord Holt refused, however, to allow promissory notes the privileges of negotiability and it was not until the Statute of Anne (1704) that the full doctrine of negotiability became a part of the English law. This statute is the first great landmark in the Anglo-American law of bills and notes, and we quote its most important section: "Whereas, it hath been held that notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum therein mentioned, are not assignable or indorsable over, within the custom of merchants, to any other person; and that the person to whom the sum of money mentioned in such note is payable, cannot maintain an action by the custom of merchants, against the person who first made and signed the same; and that any person to whom such note shall be assigned, indorsed, or made payable could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same; therefore, to the intent to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner; be it enacted, that all notes in writing whereby any person shall promise to pay to any other person, his order or unto bearer any sum

of money mentioned in such note, shall be taken and construed to be due and payable to any such person to whom the same is made payable, and also every such note shall be assignable or indorsable over in the same manner as inland bills of exchange are, or may be, according to the custom of merchants; and that the person to whom such sum of money is or shall be by such note made payable, shall and may maintain an action for the same as he might do upon an inland bill of exchange, made or drawn, according to the custom of merchants; and that any person to whom such note is indorsed, or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain his action for such sum of money, either against the person who signed the note, or against any of the persons that indorsed the same, in like manner as in cases of inland bills of exchange."

VARIOUS NEGOTIABLE INSTRUMENTS ACTS.—Although the law of negotiability originated on the continent of Europe, it has assumed a peculiar variety of forms in the different countries. Even at the present time there are no less than forty different negotiable instruments acts in countries outside of the Anglo-American group. The principal systems which have developed are classified into four groups, as follows: The French, the German, the Anglo-American and Intermediate group between the French and the German. The principal countries belonging to these various groups are:

French group: Argentine Republic, Bolivia, Bra-

zil, Chile, Colombia, Ecuador, Egypt, France, Greece, Guatemala, Hayti, Luxemburg, Monaco, Mexico, Netherlands, Nicaragua, Panama, Paraguay, Polish Russia, Serbia, Turkey, Uruguay.

German group: Austria-Hungary, Bulgaria, Denmark, Germany, Italy, Japan, Norway, Peru, Portugal, Rumania, Russia (exclusive of Polish Russia), Salvador, Sweden, Switzerland, Venezuela.

Anglo-American group: Great Britain and United States.

Intermediate group: Belgium, Cuba, Honduras, Malta and Spain.

DESIRABILITY OF UNIFORMITY.—There is no branch of law where the desirability of uniformity is greater, as negotiable documents pass from hand to hand like money and travel from one State to another. The situation which was brought about by conflicting decisions and statutes in the various States was a source of great annoyance to the business world and interrupted the free circulation of negotiable paper. The American Bar Association, which is the spokesman for the lawyers of the country, suggested about thirty years ago that the States should appoint commissioners for the promotion of uniformity of legislation throughout the United States. In 1895 twenty-seven States had acted upon this suggestion. At a conference held in August of that year in Detroit, Michigan, at which representatives of nineteen States were present, a resolution was adopted requesting the draft of a bill making uniform the law of negotiable paper. Mr. John J. Crawford

of the New York Bar was asked to make a draft of the proposed law, which he did, and this was submitted to the commissioners at their meeting in Saratoga in August, 1896. There was a heated controversy, familiar to every student of the law of commercial paper, known as the Ames-Brewster controversy. Professor James Barr Ames, Dean of the Harvard Law School, violently criticised twenty-three sections, and Judge Lyman D. Brewster, the President of the National Conference on Uniform State Laws, strongly defended the Act. Time has since shown the wisdom of the work of the commissioners. New York was the first State to pass the Negotiable Instruments Law in 1897. The law has since been adopted by every State in the country; also it has been adopted by the District of Columbia, Alaska and the Philippines. The following list shows the date of enactment in the various jurisdictions:

Alabama (1907)
Alaska (1913)
Arizona (1901)
Arkansas (1913)
California (1917)
Colorado (1897)
Connecticut (1897)
Delaware (1911)
District of Columbia (1899)
Florida (1897)
Georgia (1924)
Hawaii (1907)
Idaho (1903)
Illinois (1907)
Indiana (1913)
Iowa (1902)
Kansas (1905)
Kentucky (1904)
Louisiana (1904)
Maine (1917)
Maryland (1898)
Massachusetts (1898)
Michigan (1905)
Minnesota (1913)

Mississippi (1916)
Missouri (1905)
Montana (1903)
Nebraska (1905)
Nevada (1907)
New Hampshire (1909)
New Jersey (1902)
New Mexico (1907)
New York (1897)
North Carolina (1899)
North Dakota (1899)
Ohio (1902)
Oklahoma (1909)
Oregon (1899)
Pennsylvania (1901)
Philippines (1911)
Rhode Island (1899)
South Carolina (1914)
South Dakota (1913)
Tennessee (1899)
Texas (1919)
Utah (1899)
Vermont (1912)
Virginia (1898)
Washington (1899)
West Virginia (1907)
Wisconsin (1899)
Wyoming (1905)

BASIS OF UNIFORM ACTS.—The passage of the Negotiable Instruments Law began the series of uniform acts which have since been drawn up by the same commissioners and from time to time adopted by the various States. The student of commercial law, during his studies, will have occasion to make use of the Uniform Sales Act, the Uniform Bills of Lading Act, the Uniform Warehouse Receipts Act, the Uniform Stock Transfer Act and perhaps others.

COMMON LAW IMPORTANT.—Even in jurisdictions where the Negotiable Instruments Law has been enacted the common law is still important in determining controversies on negotiable instruments. It is important in the first place as aiding the interpretation of the language of the Negotiable Instruments Law. Unless that language clearly requires a different construction, courts presume that

the statute restates the rule of the common law which existed prior to the enactment of the statute. In the second place, the common law is still important because cases not infrequently arise which are not clearly covered by the statute, and section 196 of the statute enacts that cases not provided for in the statute shall be governed by the unwritten law previously existing. That portion of the common law which relates to negotiable instruments and to certain other mercantile transactions is called the "law merchant." There is one interesting question that suggests itself. Have we reached a point where no new principle of negotiability may hereafter be developed because of the fact that the Negotiable Instruments Law codifies the law of bills and notes? Of course, as we have just seen, the Act itself provides that the cases not covered by the statute shall be governed by the rules of the common law. But suppose we are seeking to have the courts recognize a new principle of negotiability. Nothing in the common law will probably be found as a precedent, and the Negotiable Instruments Act is silent. Commenting on this situation, Mr. Justice Swayze, in the case of Strickland v. National Salt Co., 79 N. J. Eq. 182, 81 Atl. 828, 831, said: "We are not to be understood, however, as holding that no instrument can hereafter acquire the elements of negotiability unless it answers the requirements of the statute (N. I. L.). Mr. Machen, in his work on corporations points out the danger of holding that the Negotiable Instruments Law stops further development of the law merchant."

AMENDMENTS AND VARIATIONS.—In a few States the Negotiable Instruments Law has been somewhat amended. All important amendments are indicated by notes following the several sections of the Act. Unfortunately in the statute as passed in the several States the section numbering adopted by the Commissioners of Uniform Laws has not always been followed. The references in this book are to the numbers adopted by these commissioners. As the Negotiable Instruments Law, even in the few passages where its terms are not wholly clear or satisfactory, is the ultimate authority on the subject, it is necessary to be familiar with its language and arrangement. Each section of the Act should be read carefully, but before the Act is studied, a few fundamental principles in regard to negotiable instruments should be understood.

FORMS OF NEGOTIABLE INSTRUMENTS.—The first essential is to carry in mind the customary form of the negotiable instruments we have just mentioned. A promissory note is defined by the Negotiable Instruments Law as follows: "A negotiable promissory note within the meaning of this Act is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer."

A bill of exchange is defined by the Negotiable Instruments Law as follows: "A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requir-

ing the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer."

A check is defined by Negotiable Instruments Law as "a bill of exchange drawn on a bank payable on demand." Reference should be made to the form of these documents as set forth on pages 30 and 31.

Other documents may be negotiable in form, such as the ordinary bearer corporation bonds, liberty bonds, certificates of stock, and bills of lading. The principles discussed in this chapter would apply, ordinarily, to these documents, and are discussed more in detail in the chapters devoted to them.

WHAT IS NEGOTIABILITY?—Negotiability has been defined as that quality whereby a bill, note, or check, passes freely from hand to hand like currency. In fact, all of these documents are substitutes for currency, and so far as is practicable, it is desirable that they should pass as freely as currency. Negotiability applies only to this branch of law, while assignability applies to ordinary cases of contract law.

ILLUSTRATIONS.—The following examples illustrate the difference between the two: Jones worked for the Baltimore & Ohio Railroad Co. He presented his bill of $100 to the proper official, and a check was issued by the railroad, payable to the order of Jones for that amount. Jones took the check, indorsed it and with it paid his grocery bill. The grocery man deposited the check in his bank, and was notified shortly thereafter that payment had been stopped on the check by the Baltimore & Ohio. They

claimed a fraud had been committed, that Jones was overpaid $50, and therefore, they refused to honor the check. The grocery man, having taken this check in the usual course of business, is what we term a "holder in due course." The Negotiable Instruments Law defines a holder in due course thus:

Section 52. "A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face.

2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.

3. That he took it in good faith and for value.

4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

A holder in due course, then, would be entitled to collect the full $100 from the Baltimore & Ohio. This $100 check is governed by the law of negotiability with the result which we have just indicated. Now change the facts a trifle. Jones presented his bill to the same officer of the Baltimore & Ohio as before. The officer said that checks were made out regularly on the first of each month. It was the fifteenth and Jones did not feel able to wait until the first of the next month. He went to a friend and told him of his claim against the Baltimore & Ohio and said: "I will assign this claim to you for $95, and then you can present the assignment, which I will draw up and sign, to the Baltimore & Ohio on the first of the month, and get

the $100." His friend agreed and advanced the money. When he presented the written assignment to the proper officer on the first of the month, he was told that the railroad had discovered that Jones' claim was really good for only $50, and that was all they would pay. Although his assignment read for $100, he could collect only $50. This illustration is governed by the law of assignability, which applies to practically all contracts, apart from commercial paper. Under the rules of assignability, a person can assign no better claim than he has, or, as is sometimes said, the assignee stands in the shoes of the assignor. Jones really had a claim of only $50 against the Baltimore & Ohio, although he claimed it was $100. He could assign no more than he really had. These two illustrations show the great difference in the result of the application of the two principles, negotiability and assignability.

A NEGOTIABLE INSTRUMENT IS A CONTRACT OR A SET OF CONTRACTS.—A negotiable instrument is a contract or a collection of contracts. An unindorsed promissory note is a single contract—contract of the maker with the payee. So an unaccepted and unindorsed check or bill of exchange is simply a contract of the drawer with the payee. When these instruments are indorsed, or when a bill of exchange is accepted, an additional contract is created. The study of the law governing negotiable instruments aims to acquire a knowledge of the terms and legal effect of the various obligations which may thus arise on negotiable paper.

THE CONTRACTS ON NEGOTIABLE INSTRUMENTS ARE FORMAL CONTRACTS. —To understand the law of negotiable instruments some elementary knowledge of the law of contracts is desirable. Contracts may be divided into simple contracts and formal contracts. Simple contracts owe their validity to mutual assent of the parties, to the terms of a promise, or set of promises for which the promisee gives consideration. The typical formal contract of English and American law has been the contract under seal which was enforceable though no consideration was paid for it. For a detailed statement of what this implies, reference must be made to the volume dealing with commercial law generally. Formal contracts depend for their validity on the form in which they are made. The contracts on negotiable instruments partake of the nature of simple contracts in requiring consideration in certain cases for their validity, but they also partake of the nature of formal contracts. No instrument and no contract on an instrument which does not comply with certain rules as to form is negotiable. Moreover, the instrument itself is regarded as the obligation, not simply as evidence of it.

THE TERMS OF THE CONTRACTS ON NEGOTIABLE INSTRUMENTS ARE LARGELY IMPLIED.—In an ordinary written contract the parties write out fully the terms of their agreement, but where the customs of business lead men to enter constantly into contracts of the same sort, abbreviated statements of the terms of their contracts are likely

to be employed. Thirty days, for instance, may be used in a contract for the sale of goods to mean that the price of goods sold is not due for thirty days, and a variety of illustrations might easily be given of abbreviated mercantile memoranda in contracts. So in bills of exchange and promissory notes, the terms of the contract are not fully expressed. The contract between the maker and payee of a promissory note is indeed stated with some fulness, but the contract of a drawer of a bill of exchange or of a check is not stated. In form such a document is merely an order on another to pay a certain sum in money, but by mercantile custom it is also in legal effect an abbreviated promise that "If the drawee fails to pay on demand at maturity, and I am promptly notified of his failure, I will pay." The contract of an indorser is similarly to be understood from mercantile custom, not because of express language used. It is possible to write on negotiable instruments contracts other than those made negotiable by the custom of merchants. Thus a guaranty may be written on a bill or note, but its effect must be judged as a simple contract, as if it were on a separate paper.

ABSOLUTE AND PERSONAL DEFENCES. —The law distinguishes between a situation where there is only apparently, but not really, a negotiable obligation, and a case where there is an actual negotiable obligation, but which, for some reason in justice, should not be enforced. If the signature of a maker to a negotiable instrument is forged, though he has apparently entered into a negotiable obliga-

tion, in fact he has not. If, however, he has been induced by fraudulent misstatements to sign such an instrument, he has actually entered into a negotiable obligation, though it is unjust to enforce it in favor of the fraudulent payee. On the forged note nobody could recover against the apparent maker. On the fraudulent note the payee could not recover, but a holder in due course could. It may then be said that forgery is an absolute or real defence while such fraud as that given in the illustration is a personal or equitable defence, or, briefly, an equity. No equitable defence is available against a holder in due course, that is, one who has paid value for the instrument before maturity in good faith without notice of the defence. This distinction between absolute or real defences on the one hand and personal defences or equities on the other hand, is fundamental in the law of negotiable instruments, and it is essential to remember which defences fall under each of these headings.

WHAT ARE REAL AND WHAT ARE PERSONAL DEFENCES?—The following defences to an obligation are absolute or real:

First—The lack of genuineness of the signature. This may be due to forgery or it may be due to lack of authority on the part of an agent who made the signature on behalf of another.

Second—Fraud of some kinds.

Third—Lack of title, as where a holder claims through a forged indorsement.

Fourth—Bankruptcy of the holder.

Fifth—Material alteration of the instrument.

Sixth—Legal incapacity, as of a minor, an insane person, and in some jurisdictions—as to some matters—a married woman.

Seventh—Illegality of certain kinds.

Eighth—The legal discharge of the instrument or the obligation in question.

The following are personal defences, or equities only, and are not available against a holder in due course:

First—Illegality of certain kinds.

Second—Fraud generally.

Third—Duress.

Fourth—Lack of delivery of the instrument.

Fifth—Lack of consideration.

Sixth—Failure of consideration.

Seventh—Discharge of the instrument before maturity.

Eighth—A surety discharged by certain dealings with his principal which are prejudicial to him.

Ninth—Set-off.

MEANING OF DEFENCES.—The meaning of these various defences will not be understood without the explanation of them hereafter given, but a list of them seems desirable in this place as a summary. There may be a defence to one obligation on a negotiable instrument and no defence to another. Sometimes all the obligations on an instrument are subject to the same defence, as where the instrument is materially altered after all the signatures have been put upon it. Sometimes there may be a defence of one kind to one obligation on the instrument, and a defence of

another kind to another obligation. The obligation of each person whose name appears on the instrument frequently must be considered separately.

WHAT A STUDY OF THE NEGOTIABLE INSTRUMENTS LAW INCLUDES.—The chief provisions of the Negotiable Instruments Law may be classified under the following headings:

First—What is essential for the formation of a negotiable instrument or for a negotiable obligation on such an instrument?

Second—What is the full meaning of each contract which is briefly stated on such an instrument? That is, what does a maker, drawer, acceptor, indorser in legal effect promise to do?

Third—What are the absolute and what the personal defences which may excuse a promisor from performing his promise?

Fourth—Who is a holder in due course, and, therefore, not subject to personal defences or equities?

EXAMINATION OF THE ACT.—With this introduction we may take up the examination of these topics and of the language of the Act, with appropriate explanation and illustration, of the several sections. The meaning of some is plain enough without comment. Others, though perhaps plain to a lawyer, assume a general knowledge of law and legal phraseology which one who is not a lawyer cannot be expected to possess.

CHAPTER I

Form and Interpretation

FORM OF NEGOTIABLE INSTRUMENTS.—We have outlined in the introductory chapter the forms of negotiable instruments. We must now consider what variations may be made in the forms we have given without destroying negotiability. Any instruments to be negotiable must conform to the following requirements (Section 1):

1. Must be in writing and signed by the maker or drawer.
2. Must contain an unconditional promise or order to pay a sum certain in money.
3. Must be payable on demand, or at a fixed or determinable future time.
4. Must be payable to order or to bearer.
5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

THE INSTRUMENT MUST BE WRITTEN AND SIGNED AND MAY BE SEALED.—As to the material which must be used, it does not appear from the decisions that paper need necessarily be used. If it were clearly proved that a negotiable document written upon metal or wood or even a piece of slate were intended to be such, a court would undoubtedly hold it valid. It is needless to say that a document in such a form would not readily be accepted by a purchaser or honored by a bank, because it would excite

suspicion. Perhaps we may doubt whether there could be a holder in due course of such a document. The body of any negotiable instrument may be typed or printed or written by a person other than the maker or drawer so that the signature will be in a different handwriting. In fact, this is frequently done in the case of large corporations issuing a great number of negotiable instruments. This will have no effect on the validity of the document. Legally, a person may probably sign with a rubber stamp, but, as we have said before, a document authenticated in that way would be difficult to pass or to have honored. "Signed" does not necessarily mean subscribed at the end of the paper, although that is the usual and proper method of signing. A note reading, "I, John Smith, promise to pay to the order of Thomas Brown, $100," is just as much a promissory note if the name John Smith was written by him with the intention of authenticating the instrument, as it would be had he written it in the ordinary form: "I promise to pay to the order of Thomas Brown" and signed it at the end "John Smith." It was held in the early common law that a seal on an instrument otherwise negotiable in form destroyed negotiability. This has been changed by Section 6 of the Negotiable Instruments Law, which provides that the validity and negotiable character of an instrument is not affected by the fact that it bears a seal.

A PROMISSORY NOTE MUST CONTAIN AN UNCONDITIONAL PROMISE.—A promissory note must contain an unconditional promise and

a bill of exchange or a check must contain an unconditional order. As regards a note, the usual and approved form is to have the document read, "I promise to pay." It is not, however, absolutely necessary that this set form be followed and anything which is the equivalent of this form will constitute a promissory note if the other elements are present. The case of Hussey v. Winslow 59 Me. 170, illustrates this point. The note in that case read as follows:

5 cent stamp.

"Nobleboro, Oct. 4, 1869.
Nathaniel O. Winslow, Cr.
By labor 16 3/4 days at $4 per day . . $67.00
Good to barer,
Wm. Vannah."

The court said: "It would seem that the only possible construction which can be given to this instrument is, substantially, this: 'In consideration of 16 3/4 days' labor, performed by Nathaniel O. Winslow, at $4 per day, amounting to $67, I promise to pay him, or bearer, that sum on demand. [Signed] William Vannah.' Here we have every element of a negotiable promissory note; a maker, a payee, a promise or engagement to pay a certain sum of money at a specified time, absolutely and unconditionally, and the word 'bearer' to make it negotiable."

DUE BILLS.—There are certain documents which are merely written acknowledgments of a debt which are commonly spoken of by the courts and text

books on negotiable paper as due bills. For Jones merely to acknowledge in writing that he owes Smith $100 does not constitute the writing of a negotiable document. The case of Currier v. Lockwood 40 Connecticut 349 is one of the leading cases on this point. The plaintiffs offered in evidence the following writing:

17.14 Bridgeport, Jan. 22, 1863.

Due Currier and Barker seventeen dollars and fourteen cents, value received.

Frederick Lockwood.

At the time this note was given, the plaintiffs were partners under the name of Currier and Barker. In deciding whether this document was negotiable, the court states: "The writing given in evidence in this case is a due bill, and nothing more. Such acknowledgments of debt are common, and pass under the name of due bills. They are informal memoranda, sometimes here, as in England, in the form of 'I O U.' They are not promissory notes which are classed with specialties in the statute of limitations. The law implies indeed a promise to pay from such acknowledgments, but the promise is simply implied, and not expressed. It is well said by Smith, J., in Smith v. Allen, 5 Day 337, 'Where a writing contains nothing more than a bare acknowledgment of a debt, it does not in legal construction import an express promise to pay; but where a writing imports not only the acknowledgment of a debt but an agreement to pay it, this amounts to an express contract.' In that case, the words 'on demand' were held to import and to be an

express promise to pay. That case adopts the correct principle, namely, that to constitute a promissory note there must be an express as contradistinguished from an implied promise. The words 'on demand' are here wanting. The words 'value received' which are in the writing signed by the defendant, cannot be regarded as equivalent to the words 'on demand. The case of Smith v. Allen went to the extreme limit in holding the writing there given to be a promissory note, and we do not feel at liberty to go further in that direction than the court then went."

VALUE RECEIVED.—Suppose we vary slightly the form of the note just commented on so that it shall read "Due Currier and Barker $17.14 on demand," or "Due Currier and Barker or bearer $17.14." It has been held in both of these latter cases that adding words of negotiability or setting a certain time for payment is the equivalent of a direct promise and, therefore, that both of these latter documents are negotiable. In the Currier and Lockwood note, the question may arise as to what effect the expression "value received" has. The court held that it had no effect on the promise and it is now provided by Section 6 of the Negotiable Instruments Law that the validity and negotiable character of an instrument is not affected by the fact that it does not specify the value given or that any value has been given therefor. It is true that many of the printed forms of notes in common use still have the expression "value received" on them somewhere, but this is simply a survival of an old custom without adding any legal effect.

A BILL OF EXCHANGE MUST CONTAIN AN UNCONDITIONAL ORDER.—The words "unconditional promise" refer to promissory notes; the requirement of an unconditional order relates to bills of exchange or checks. Suppose a draft in this form: an order on the drawee to pay a specified sum on a fixed day adding "charge the same to the $1,800 account." Is that unconditional? Yes, but compare with it the same case slightly changed: an order to pay on a fixed day "out of the $1,800 due me." That last form is not an unconditional order because by its terms the order depends on there being $1,800 due the drawer. If there is nothing due him, nothing would be payable under the terms of the order. But in the instrument as we stated it at first there was an order to pay and then a request to charge to a special account. (See Section 3.) There is one form of instrument which under the statute is an unconditional order though it might not seem to be. Making an instrument payable at a bank is an order on the bank to pay the instrument, and makes the instrument in effect a bill of exchange drawn on the bank. (Section 87.)

CONDITIONAL ORDER.—Suppose the note reads: "I promise to pay A. B. or order $100 on his wedding day," and is properly signed. This would not be a good promissory note, for although A. B. is engaged and the wedding date is set, still he may never get married. The promise must not be conditional and even if A. B. actually gets married, still the happening of the event does not cure the defect.

FORM OF INSTRUMENT.—Reference to the forms which we have given on pages 30 and 31 will show that we use the imperative mood of the verb to pay, and this is in compliance with the provisions of the section of the Negotiable Instruments Law which we are considering. As we found in the case of the promissory note, it is also true here that the courts do not require the strictest observance as to the form, and it is not necessary that the words should be literally in the imperative mood. In the two cases always given as the authorities, the facts are as follows: In Little v. Slackford, Moody and M. 171 the document read:

> "Mr. Little, please to let the bearer have seven pounds, and place it to my account, and you will oblige
>
> Your humble servant, R. Slackford.

The court held this was not an unconditional order and, therefore, that the document was not negotiable. In Ruff v. Webb, 1 Esp. 129, the form was:

> "Mr. Nelson will much oblige Mr. Webb by paying to J. Ruff, or order, twenty guineas on his account."

This was held to be a bill of exchange and is an illustration of what is commonly held, that words of politeness may still constitute an order. In the previous case, the court held that the expression "Please to let the bearer have" amounted to a mere request for a favor. Although these two cases are the ones frequently cited, we must admit that the distinction between the two forms of expression is slight, and there are cases where expressions similar to those in Little

CHECK

No. 642 Slatewood, Indiana, January 14, 1922

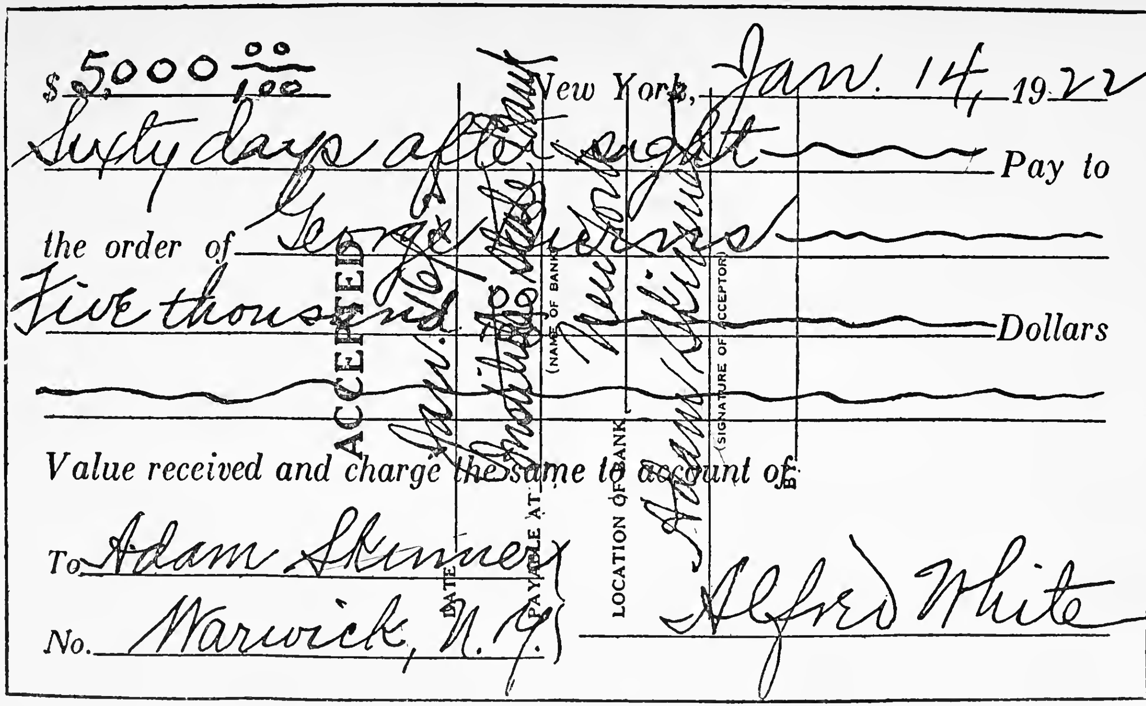
THE INSTITUTE STATE BANK 17-81

Pay to the order of Stewart Locke

Five hundred 00/100 Dollars

$500.00/100 Gardiner Palmer

Bill of Exchange or Draft


$ 5000 00/100 New York, Jan. 14, 1922

Sixty days after sight Pay to

the order of George Burns

Five thousand 00/100 Dollars

Value received and charge the same to account of

To Adam Skinner

No. Warwick, N.Y.

Alfred White

ACCEPTED

DATE Jan. 16, 1922

PAYABLE AT

(NAME OF BANK)

LOCATION OF BANK New York

BY Adam Skinner

(SIGNATURE OF ACCEPTOR)

v. Slackford have been held to be equivalent to an order. It is agreed that the word "authorize" is not equivalent to an order, and, therefore, in Hamilton v. Spottiswoode, 4 Exch. 200 where the words were: "We hereby authorize you to pay on our account to the order of C", the court said "these words do not import an absolute intention that the money should at all events be paid, but merely authorize the defendant to pay it."

CONFLICT OF LAW.—We made the statement in the introductory chapter that all of the States except one had passed the Negotiable Instruments Law. The conclusion the student might draw from this is that the law of negotiable paper is now uniform throughout the country. Of course, such is the purpose of having a uniform law. We shall, however, have occasion to point out in several instances that the law is not always uniform. The matter spoken of in the last paragraph is an illustration. The Act requires that a bill shall contain an unconditional order. What is an unconditional order, however, is a matter of interpretation by the court. You can readily see that two courts might differ in their interpretation of the same document. While in Little v. Slackford, the English court held that the expression used did not constitute an order, in a similar expression in Biesenthall v. Williams, 62 Ky. 329, there was a contrary holding. It will develop that in considering any uniform law, we must look for such occasional differences of view; and so even our plan of uniform legislation cannot produce absolutely uniform interpretation of that

law throughout the country. Probably, when the occasion arises, the commissioners of uniform laws will again re-draft the sections of the present Act which have been differently interpreted in different States and propose that those sections be amended to correspond with the decisions entitled to the greatest respect. As we take up the various sections of the Act, we shall point out the striking cases where there has been a conflict in the construction of a section by various courts.

NEGOTIABLE INSTRUMENTS MUST BE PAYABLE IN A SUM CERTAIN IN MONEY.— If negotiable paper is to be an effective substitute for money, it follows that it should be payable in money. Hence, a note reading, "I promise to pay to the order of John Jones $100 and deliver 50 lbs. of tobacco" is not negotiable, nor would it be negotiable if it read, "I promise to pay to the order of John Jones 10 ounces in gold" although gold is the basis of our currency. In other words, by money, as we use that term in negotiable paper, we mean legal tender, except in so far as the fifth subdivision of Section 6 relates to this matter. There is one variation in the form of a negotiable document, which is suggested by the case of Hodges v. Shuler, 22 N. Y. 114. That note read:

"Rutland and Burlington Railroad Company.

No. 253 $1,000

Boston, April 1, 1850.

In four years from date, for value received, the Rutland and Burlington Railroad Company promises to pay, in Boston, to Messrs. W. S. and

D. W. Shuler, or order, $1,000, with interest thereon, payable semi-annually as per interest warrants hereto attached, as the same shall become due; or upon the surrender of this note, together with the interest warrants not due to the treasurer, at any time until six months of its maturity, he shall issue to the holder thereof ten shares in the capital stock in said company in exchange therefor, in which case interest shall be paid to the date to which a dividend of profits shall have been previously declared, the holder not being entitled to both interest and accruing profits during the same period.

T. Follett, President.

Sam. Henshaw, Treasurer."

The court said, in deciding the case: "The instrument on which the action was brought has all the essential qualities of a negotiable promissory note. It is for the unconditional payment of a certain sum of money, at a specified time, to the payee's order. It is not an agreement in the alternative, to pay in money or railroad stock. It was not optional with the makers to pay in money or stock, and thus fulfill their promise in either of two specified ways; in such case the promise would have been in the alternative. The possibility seems to have been contemplated that the owner of the note might, before its maturity, surrender it in exchange for stock, thus canceling it and its money promise; but that promise was nevertheless absolute and unconditional, and was as lasting as the note itself. In no event could the holder require

money and stock. It was only upon a surrender of the note that he was to receive stock; and the money payment did not mature until six months after the holder's right to exchange the note for stock had expired. We are of the opinion that the instrument wanted none of the essential requisites of a negotiable promissory note. It was an absolute and unconditional engagement to pay money on a day fixed; and although an election was given to the promisees, upon a surrender of the instrument six months before its maturity, to exchange it for stock, this did not alter its character, or make the promise in the alternative, in the sense in which that word is used respecting promises to pay. The engagement of the railroad company was to pay the sum of $1,000 in four years from date, and its promise could only be fulfilled by the payment of the money, at the day named."

INTERPRETATION BY COURT.—The deciding factor always is whether the option to pay the cash or deliver the stock is with the holder of the note or the maker. This would be a matter in which the court would determine what was actually meant. As every careful lawyer should seek to advise a client in such a manner so as to prevent rather than invite litigation, an attorney could always avoid any possible question by suggesting the issuing of a note in this form:

"One year after date, the Smith Corporation promises to pay the bearer $1,000 or deliver 10 shares of the preferred stock of said corporation, at the option of the holder."

In this form, the holder would have an absolute right to demand the cash if he wished it, and there would be no litigation necessary to settle the question of the negotiability of the note.

INSTRUMENTS PAYABLE IN CURRENCY.—An instrument is none the less negotiable because it "designates a particular kind of current money in which payment is to be made;" that is, a negotiable instrument may be payable in any kind of current money, as in gold or in $1 bills or other current money. But what does current money mean? Prior to the passage of the Negotiable Instruments Law there was considerable litigation on the question whether an instrument payable in currency or in current funds was negotiable. Some courts held that currency or current funds meant the money or legal tender that was current, and, therefore, that the instrument was negotiable. Other courts said that currency or current funds meant what was current as money, that is, used as such; whether, in fact, it was money or not. It seems probable that the latter meaning is really the true sense of the words, and under that meaning if it is requisite that a negotiable instrument shall be payable in money, an instrument payable in currency or current funds is not negotiable. It is probable that the Negotiable Instruments Law was meant to settle this controversy when it provided that an instrument is negotiable though it designates a particular kind of current money in which payment is to be made; but it cannot be said that those words do settle the controversy. "Current money" as used in

the statute does not seem the equivalent of "currency or current funds," if the latter words are understood to mean what is used as money whether it is really money or not. The Supreme Court of Iowa, in Dill v. White, 132 Iowa 327, has held that a check payable in current funds is not payable in money and is, therefore, not negotiable. On the other hand, where the original owner of a certificate of deposit payable "in current funds" was held up by a thief and forced to indorse and part with the certificate, it has been held that the holder in due course is protected as against the original owner. This is true in many States.

PROPOSED AMENDMENT TO SECTION SIX OF THE NEGOTIABLE INSTRUMENTS LAW.—In an article on "Some necessary amendments to the Negotiable Instruments Law" in 26 Harvard Law Review, page 493, 588, Professor Brannan says: "The question whether an instrument payable in 'currency' or in 'current funds' is payable in money has given rise to much conflict of authority. On one side are the cases which construe the words 'currency' or 'current funds' to mean legal tender or such currency as, although not legal tender, yet circulates actually and lawfully at par with coin, and, therefore, to make the instrument payable in money. On the other side are cases in which it is held that any currency or current funds may be tendered in payment whether at par or not, and that the instrument is, therefore, not payable in money. If the former construction is put upon the words 'currency' or 'current funds,' no objection can be made to regarding the

instrument as payable in money, for the amount to be paid is certain. The Negotiable Instruments Law leaves the question unsolved, for in section 6-5 it is simply provided that the validity and negotiable character of an instrument is not affected by the fact that it 'designates a particular kind of current money in which payment is to be made.' What is meant by 'current money' or rather, what is meant by 'money'? Does it include not only gold and silver coin, but also bank notes, treasury notes and gold and silver certificates? All of them are current and are popularly spoken of as money, but they are not all legal tender. It has been suggested that the last paragraph of section 6, subdivision 5, might be amended so as to read, '* * * is payable in currency or current funds or designates a particular kind of current money in which payment is to be made.' This amendment will make an instrument having the other required formal requisites, and payable in currency or current funds, negotiable in the States in which the Negotiable Instruments Law has been adopted. But it is submitted that such an instrument may not have a uniform value in all such States. For the question still remains, what is meant by 'currency' or 'current funds,' and here the courts will decide as they have done in the past. Indeed, the Supreme Court of Iowa, since the adoption of the Negotiable Instruments Law, has held, although without referring to the Act, that a check payable 'in current funds' is not negotiable. The court followed former decisions based on the interpretation of the words, 'current funds' as includ-

ing any currency, although it might not be at par with coin. In order to make instruments payable in 'currency' or 'current funds' not only negotiable but of uniform rule, the words in question ought to receive the same interpretation everywhere. This can be done by making section 6, subdivision 5, read as follows: '(5) * * * is payable in currency or current funds or designates a particular kind of current money in which payment is to be made. The words 'currency,' 'current money,' or 'current funds' shall mean such circulating media as are legal tender or are lawfully and actually circulating at par with legal tender at the time and place of payment.' " Reviewing this article in his recent book on the Negotiable Instruments Law Professor Brannan further adds: "Since the foregoing was written, it has been held in New York that an instrument by which the maker agreed to pay to the order of the payee '$2,340 currency,' is a 'negotiable promissory note' under the Negotiable Instruments Law, and in Connecticut it has been held that where a check had been tendered in payment of rent and was refused and payment 'in money' was demanded, that this demand was fairly met by a tender in bills of the currency of the United States, whether such bills were legal tender or not. The Negotiable Instruments Law was not cited. The conflict thus already apparent seems to make clear the necessity for the amendment of the section in the interest of uniformity."

PAYMENT IN CURRENCY.—It has also been suggested that this section of the Negotiable Instruments Law be universally amended as it has been in

Illinois, so that the subdivision in question shall read that the negotiable character of an instrument shall not be affected by the fact that it is payable in currency or current funds, or designates a particular kind of current money in which payment is to be made. In the meantime it is safer not to accept as negotiable any instrument expressed as payable in currency or current funds.

THE INSTRUMENT MUST BE CERTAIN IN TIME OF MATURITY.—The third subdivision of section 1 of the Act provides that the instrument "must be payable on demand or at a fixed or determinable future time." Generally, instruments are payable either at a fixed time or on demand, but sometimes bills of exchange are payable a fixed number of days after sight. When such a bill will become due is not fixed when the instrument is issued, but it can be fixed by presenting the instrument and starting the days to run. You cannot tell when you look at the instrument just how soon it will be due, but the holder can make it become due within the given number of days after sight by formally presenting the instrument. The time is therefore determinable. Section 4 of the Negotiable Instruments Law further defines what is meant in section 1 by "a fixed or determinable future time."

CERTAINTY OF TIME OF PAYMENT.—An instrument is payable at a determinable future time, within the meaning of this Act, which is expressed to be payable (Section 4):

1. At a fixed period after date or sight; or

2. On or before a fixed or determinable future time specified therein; or
3. On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable and the happening of the event does not cure the defect.

The typical negotiable instrument is payable at a fixed day in the future, as on July 1, 1926, or in three months from date. An instrument payable on demand or at sight or at a fixed period after demand or sight involves a little extension of the principle of certainty, since no one can tell exactly when demand will be made, but as the holder can make the time certain by making demand, the value of such an instrument is exactly calculable, and there has never been any question that such instruments are negotiable. But the statute allows negotiability to some instruments where there was doubt at common law, though the statute has followed what was previously the weight of authority. An instrument may be payable "on or before" a fixed or determinable future time. Therefore, a note payable on or before July 1 is a negotiable instrument. If this means at the option of the holder there would be no more lack of certainty than in demand paper since in effect the instrument would be payable on demand prior to July 1, and if no prior demand were made, then on that day. But the option is that of the maker, and it is impossible for the holder to tell whether the option will be exercised.

Still he knows the exact day when at latest the instrument is payable. A further latitude, however, is allowed by the enactment in subdivision 3, that an instrument is negotiable though it is payable on an event "which is certain to happen, though the time of the happening is uncertain." That, it seems, is an objectionable provision, and the only reason that the objection is not more apparent is that the case which is permitted is such a rare one. A common illustration given is a note payable on a man's death; that is an event certain to happen, but the time of happening is uncertain. Now such a note is wholly unsuited for the purpose of negotiable instruments. Negotiable instruments are intended as a kind of adjunct to money, as something that has a definite value and which can be dealt with on that assumption. It is because of this idea, that negotiable instruments are a kind of adjunct to money, that all these requirements which we are considering as to certainty of the promise, the certainty of the time and the certainty of the medium of payment are made. But an instrument payable at a man's death is, of course, of speculative value. It is customary to contrast with such an instrument, one made by a bachelor payable on his marriage. That is not certain to happen; he may never marry, and therefore such an instrument is not negotiable, even under the broad words which are used in the Negotiable Instruments Law. The same point is illustrated in the case of a draft payable on the arrival of certain goods. It is not negotiable. The goods may never arrive.

TENDENCY OF COURTS.—Undoubtedly the criticism of Professor Ames to the effect that "Nothing could be more inconsistent with negotiability of a bill or note than that the holder should have to be continually on the alert to ascertain the precise date when it should become payable, in order to charge the drawer or indorser," is founded on sound reason. Unfortunately, the courts have been rather lax in holding documents negotiable where the time of payment is quite uncertain. Two cases may be mentioned as illustrative of this tendency. In Cota v. Buck. 7 Metc. (Mass.) 588, the document in question read:

"New Ashford, March 13th, 1840. For value received, I promise to pay John Pero, or bearer, five hundred and seventy dollars and fifty cents, it being for property I purchased of him in value at this date, as being payable as soon as can be realized of the above amount for the said property I have this day purchased of said Pero, which is to be paid in the course of the season now coming." Chief Justice Shaw in deciding the case said: "The true test of negotiability of a note seems to be, whether the undertaking of the promisor is to pay the amount at all events, at some time which must certainly come, and not out of a particular fund, or upon a contingent event. If it were payable on a contingency, or out of a particular fund, it would not be negotiable. This note, we think, was payable by the promisor at all events, and within a certain limited time. The note is obscurely written and ungrammatical. But we think the meaning was this: that the signer, for value received in the

purchase of property, promised to pay Pero or bearer the sum named, as soon as the termination of the coming season, and sooner, if the amount could be sooner realized out of the fund. Such reference to the sale of the property was not to fix the fund from which it was to be paid, but the time of payment. The undertaking to pay was absolute, and did not depend on the fund. So as to the time, whatever time may be understood as the 'coming season,' whether harvest time or the end of the year, it must come by mere lapse of time, and that must be the ultimate limit of the time of payment."

Again in Capron v. Capron, 44 Vermont, 412, the note read: "For value received I promise to pay B. D. or Bearer, seventy-five dollars one year from date with interest annually; and, if there is not enough realized by good management in one year to have more time to pay." This note was held negotiable. The court observed that as long as the payment is certain and the uncertainty is only as to the length of time to be given, this uncertainty the law makes certain by giving a reasonable time after the time prescribed to make payment. All that can be said in regard to these cases is that the decisions in the particular jurisdiction under whose law the note is governed should be consulted. This is another case where we may find a good illustration of a conflict in the law, although the case is covered by the Uniform Act.

WORDS OF NEGOTIABILITY ARE NECESSARY.—Subdivision 4 of Section 1 provides that the instrument "must be payable to order or to bearer."

It does not matter whether the instrument reads "to the order of A" or "to A or order." Legally those mean the same thing. It may be to the order of two or more jointly or to the order of any one or more of several. It may be to the order of the holder of an office for the time being (Section 8). It does not matter whether it is simply "to bearer" or whether it is to "A or bearer." The definition of an instrument payable to bearer is further enlarged by section 9. To illustrate what has been said, that the obligations of the different parties to a negotiable instrument are separate contracts, we may suppose the case of a note, non-negotiable because of the omission of the words "order" or "bearer" but indorsed by the payee in terms "to the order of" an indorser. The payee's indorsement is a negotiable contract, though the contract of the maker of the note is not.

BEARER INSTRUMENT.—The word "bearer" is not, of course, the only word that may be used. Other words conveying the same implication will serve as well. Thus a bill payable to "holder" is payable to bearer. While the usual form of a bearer instrument is "Pay to bearer," this may also be varied as "Pay to A or bearer." It has been held, however, that the expression, "Pay to the bearer, A." destroys negotiability and it can be readily seen why this is so, since the instrument is payable to one person only, not to A or bearer. Suppose a document which omits words of negotiability has written across the face of it, "This note shall be negotiable." Whether or not

such an expression supplies the absence of words of negotiability has been questioned, but there is some authority that such a document would be negotiable. Thus, in the case of Tanner's National Bank v. Lacs, 136 App. Div. (N. Y.) 92, the defendant made a note on a printed form which contained the usual words of negotiability, "or order." However, in the lower left hand corner, the words "Not transferable" were written in a small contracted hand. When the bank acquired the note, it did not notice these written words, and the court held that the maker of the note was not negligent in not writing the words more plainly, and on the familiar principle that the written portions of a note prevail over the printed part, held that the note was not negotiable.

THE DRAWEE MUST BE INDICATED.—If the instrument is a bill of exchange, it must be addressed to a drawee who is indicated with reasonable certainty. It may be addressed to two or more persons as joint drawees (Section 128). The courts have held that an instrument which lacks a drawee and is therefore imperfect as a bill of exchange may be sustained as a promissory note. In Peto v. Reynolds, 9 Exch. 410, the instrument was in the following form:

"Cameroons September 3, 1852.

"Exchange for £200.

"At sight of this my third of exchange, the first and second of the same tenor and date being unpaid, please to pay to S. M. Peto, Esq., or order, the sum of two hundred pounds sterling for value received, and place the same, as by letter of advice of 3d Sep-

tember, to the account of Alfred Righton."

Across the face of the bill Righton wrote the defendant's acceptance, as follows: "Accepted. Samuel Reynolds, Esq., Shern Lane, Bedminster, Bristol."

The court stated in its opinion that, "This instrument, though in the form of a bill, is not addressed to anyone, for I think it impossible to consider the acceptance as an address; but I do not see why the instrument may not be treated as a promissory note, because, upon the face of it, there is a promise to pay the amount written in the name of Samuel Reynolds. Then, if the authority to subscribe his name has been subsequently ratified, that amounts to a promise by him. Therefore, if, on the next trial, there is satisfactory evidence to show that the defendant absolutely promised to pay the amount mentioned in the instrument, he will be liable as upon a promissory note."

WHAT CONSTITUTES CERTAINTY AS TO THE SUM.—The sum payable is a sum certain within the meaning of the Negotiable Instruments Law, although it is to be paid: (1) With interest; or (2) By stated instalments; or (3) By stated instalments, with a provision that upon default in payment of any instalment or of interest, the whole shall become due; or (4) With exchange, whether at a fixed rate or at the current rate; or (5) With costs of collection or an attorney's fee, in case payment shall not be made at maturity (Section 2).

WHAT IS A SUM CERTAIN.—We have considered what is meant by money. What is meant by a "sum certain" is defined in section 2 to some extent.

The first two subdivisions state what would without any statute have been obvious. As the rate of interest is fixed by the instrument the exact sum which will be due at maturity can be calculated by any one at any time. And the sum is equally definitely fixed though payable in instalments. The third subdivision is not quite so clear. It may be thought that if such an instrument is open to any objection, it is rather open to the objection that it is not payable at a fixed time, (for, as we shall see, that also is one of the requisites of negotiability), than to uncertainty of the amount. But a change in time of maturity will also involve a change in the amount due at maturity. However, the statute solves our difficulty. The sum is certain within the meaning of the statute though the instrument is payable with exchange, either at a fixed rate or at the current rate. It is certain though payable with the cost of collection, or with an attorney's fee if payment is not made at maturity. In these cases the sum is not really certain, but the net recovery which the holder will realize is certain.

ATTORNEY'S FEES.—The provisions of the statute in regard to attorney's fees has not altogether set at rest, however, a conflict of authority which existed prior to the passage of the Negotiable Instruments Law. Before the passage of that statute four views were taken by different courts: (1) that the contract for attorney's fees was valid and the instrument was negotiable; (2) that the provision was a valid, simple contract between the parties but destroyed negotiability of the instrument; (3) that the provision

was void and contrary to public policy, but being void did not affect negotiability; (4) that the usury laws prevented any fee which would make the total charge over and above the face of the note exceed the highest rate of interest allowed by the statute. The Negotiable Instruments Law makes it clear, where it is enacted, that the provision does not destroy negotiability, but whether the effect of the statute by implication is to make valid a provision which previously was void, has been the subject of conflicting decisions. In Ohio and West Virginia, the Supreme Courts have held that the provision is void, though the note is negotiable. A contrary view has been taken by the Supreme Courts of Colorado and Virginia, that is that the provision is valid and the note negotiable. In Nebraska, North Carolina and South Dakota, the statute contains provisions that the Act shall not be construed as making valid a stipulation for attorney's fees.

WHEN PROMISE IS UNCONDITIONAL.—We have already discussed the nature of the promise or order and found that it must not be conditional, as for example, a promise to pay if it does not rain. We shall now consider this point more in detail with special reference to the provisions of Section 3 of the Negotiable Instruments Law.

An unqualified order or promise to pay is unconditional within the meaning of this Act, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or

2. A statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional.

INDICATION OF A PARTICULAR FUND IS UNOBJECTIONABLE.—We have seen that a promise or order to pay which is dependent on the existence or sufficiency of a fund or credit cannot be negotiable, but a statement of the fund or account to which the payment is to be charged is not objectionable because the sum is to be paid irrespective of whether or not the fund or credit is sufficiently large to meet the charge.

STATEMENT OF THE TRANSACTION GIVING RISE TO THE INSTRUMENT.—One matter in regard to the unconditional quality of the promise required in a note may be worth mentioning. It is provided in section 3, subdivision 2, that it does not make an instrument non-negotiable if it contains a statement of the transaction which gave rise to the instrument. Suppose this case: a note in ordinary form adds these words, "This note was given for a horse, the title to which is to remain in the seller until this note is paid." The Massachusetts court and some other courts held, before the passage of the Negotiable Instruments Law, that that note was not negotiable, on the ground that if the horse should die the maker of the note would not have to pay it, since there would be what is called "failure of consideration" for the note, the horse having died, and any purchaser of the note would have notice from its terms of this possibility. Other courts held that the buyer

of a horse under those circumstances would have to pay the price even though the horse died. The Massachusetts court under its view held such a note non-negotiable, since in effect it was conditional; the other courts held it was unconditional and negotiable, and it looks as if the same controversy might arise under the present Act. There certainly is no harm in stating the transaction which gave rise to the instrument if nothing further is added, that is, it will do to say, "This note was given for a horse," or, "This note was given for digging a ditch," but probably it would not do to add to a note, "This note was given for a horse and is not to be paid if the horse dies," nor, "This note is given for a ditch to be dug and is not to be paid unless the ditch is dug," for when you add those last words you do indicate that there is a condition to the promise of the maker and that he is not to pay in every event. Now if that condition is implied it must be just as bad as if it is expressly stated. Suppose the addition, "This note is given for a ditch to be dug." Does that carry with it the implication that unless the ditch is dug the maker is not going to pay? It certainly suggests that implication, and if so, it would seem that the note was conditional and not, therefore, a negotiable instrument. It is, of course, not necessary that an instrument should state the transaction which gave rise to it, or even that it was given for value [Section 6, subdivision 2].

ILLUSTRATION.—In the case of the First National Bank of Hutchinson v. Lightner, 74 Kansas 736, the facts were that the Snyder Planing-mill Co.

agreed to erect a barn for the price of $3000 for Lightner. Lightner accepted two orders reading as follows:

"Hutchinson, Kans., August 10, 1903.

G. W. Lightner, Offerle, Kans.:

Dear Sir—Pay to the order of the First National Bank of Hutchinson, Kansas, $1,500, on account of contract between you and the Snyder Planing-mill Company.

The Snyder Planing-mill Company,
Per J. F. Donnell, Treasurer.

Accepted:
G. W. Lightner."

The court held that the instrument in question was negotiable and its discussion on this, a rather difficult section of the Act, is given in full: "The main controversy is whether the orders given by the planing-mill company to the bank and accepted by defendant are negotiable instruments. It is true that no specific time of payment is mentioned, but that does not affect their validity as such instruments; and, where no date is mentioned, they are payable on demand. Each of them, therefore, possesses all the essential elements of a bill of exchange, unless the words 'on account of contract between you and the Snyder Planing-mill Company' make them payable out of a particular fund, and conditionally, so that the acceptance is thereby qualified.

"The law is well settled that a bill or note is not negotiable if made payable out of a particular fund. But a distinction is recognized where the instrument is simply chargeable to a particular account. In such

a case it is beyond question negotiable; payment is not made to depend upon the sufficiency of the fund mentioned, and it is mentioned only for the purpose of informing the drawee as to his means of reimbursement. A bill or note, without affecting its character as such, may state the transaction out of which it arose, or the consideration for which it was given. So, also, the insertion into a bill or note of memoranda explaining the nature of the business or debt for which the instrument is given will not make it non-negotiable, for such memoranda does not make the payment conditional.

"The test in every case is said to be, 'Does the instrument carry the general personal credit of the drawer or maker, or only the credit of a particular fund? A promise to pay a certain sum 'out of my next quarter's mail pay, which becomes due January 1, 1883,' was held to be an absolute promise to pay a certain sum of money. An instrument promising to pay a certain sum, 'being a portion of a value as under deposit in security for the payment hereof,' was held to be a promissory note payable at all events. An order which was to be charged 'to freight' was held negotiable. A note expressed to be in payment of certain tracts of land was held negotiable. Likewise, a note which stated that it was given in consideration of certain personal property, the title to which was not to pass unless the note was paid. * * *

"The mere fact that the consideration for which a promissory note is given is recited in it, although it may appear thereby that it was given for or in consid-

eration of an executory contract, or promise on the part of the payee, will not destroy the negotiability of the note, unless it appears through the recital that it qualifies the promise to pay, and renders it conditional or uncertain, either as to the time of payment or the sum to be paid. * * *

"The controversy is thus narrowed down to whether the words 'on account of contract between you and the Snyder Planing-mill Company' amount to a direction to pay out of a particular fund, or, on the other hand, are to be considered as simply indicating the fund from which the drawee, Lightner, might reimburse himself. Many of the cases attach but little importance to the words 'account of' and give the same effect to them as to the words 'out of.' * * *

"We are of the opinion that these orders cannot be construed as drawn upon a particular fund. Beyond question there are many authorities which hold similar expressions to indicate an intention to charge a particular fund. The weight of authority and reason supports the proposition that the words amount to no more than an indication of the fund from which the drawee is to reimburse himself. The words used are substantially the same as though the orders read 'and charge to account of contract with the Snyder Planing-mill Company,' or 'credit to account of contract,' etc."

THERE MUST BE NO ADDITIONAL ORDERS OR PROMISES.—After the requirements in the earlier sections of what a negotiable instrument

must contain, section 5 provides what it must not contain. There must not be any other additional order or promise. The reason for this is the same as for all the formal requisites of bills and notes—namely that the face of the instrument may show plainly an obligation, the pecuniary value of which can be calculated. Thus a promissory note to pay A or order one hundred dollars and deliver one black horse is not negotiable. The rule forbidding additional orders or promises, which is taken by the statute from the common law, becomes quite important in regard to some of the collateral notes which are used.

ADDITIONAL POWERS MAY BE GIVEN.—Section 5 authorizes several provisions in a note as to which there had been some litigation prior to the enactment of the Negotiable Instruments Law. Thus a power in the instrument to sell collateral securities in case the instrument is not paid at maturity does not interfere with negotiability, nor does a power to confess a judgment if the instrument is not paid at maturity, but that is unimportant in some States because their law does not allow a confession of judgment beforehand by a debtor as part of an obligation, whether negotiable or not. In other States, however, a debtor can give his creditor at the time the debt is created a power authorizing the clerk of the court to enter judgment against him, whenever the creditor may request. It is also not destructive of negotiability for the maker or drawer to waive the benefit of any stay or exemption law. That provision, too, is unimportant in some States because they do not allow such exemptions as

the law gives to a debtor to be waived in advance. Nor is it objectionable that the note gives the holder an election to require something to be done in lieu of the payment of money. That last provision seems a considerable addition to mercantile theory. Suppose a promise or order to pay A $100, or at A's election to build a bay window on his house. Such an alternative seems rather foreign, perhaps, to the idea that negotiable instruments are things of a fixed value current as an adjunct to money, but you will observe that it is the holder who has the option and the holder can always demand money, and therefore can properly fix a value on that note as if it were simply for $100. If the option is given to the maker of the instrument it destroys negotiability.

ILLUSTRATIONS OF ADDITIONAL PROMISES WHICH DESTROY NEGOTIABILITY.—Now these additions, to which we have called attention, to the promise in the note or order in the bill are all additional powers given to the holder rather than additional promises made by the maker, and the purpose of these powers is to make more certain of performance the main promise to pay. Let us suggest in contrast some additional promises made by the maker. A maker signs a note which includes this statement: "There is deposited to secure this note 100 shares of New York Central, and if at any time this security shall be deemed by the payee of the note insufficient collateral, I promise to deposit further collateral." In most jurisdictions an instrument containing this language regarding collateral

would not be negotiable. It may readily be seen that there is in addition to the promise to pay money, a promise to deposit further collateral, and any collateral note in which the maker promises to do other things than to pay the amount of the note, is not a negotiable instrument. However, in the Federal courts and in some of the States it has been held that such a clause does not destroy negotiability. Powers given to the holder of the instrument to sell the collateral would not render the instrument non-negotiable. A power, however, to declare the instrument due might be regarded as more objectionable, but probably even that would be held to come within the provision of the statute which says that an instrument payable on or before a fixed date is valid. In a recent case there was a stipulation on the back of a note that it was secured by collateral and that the payee agreed to look to this security for payment of the note. It was held that that provision written on the note rendered it non-negotiable. It was, in fact, not a promise to pay at all events, but a promise to pay out of a particular fund, and if the fund proved insufficient by the terms of the promise, then nothing would be due the payee.

ILLUSTRATION.—The importance of using the greatest care in inserting clauses which may effect negotiability is illustrated by the submission by a bank in the Middle West of the form of note it was using to one of the banking law journals for opinion as to whether the note was negotiable. The note read as follows:

"$...... Stockwood, Ind.,..............192..
............after date for value received, I promise to pay to the order of

THE STATE BANK OF STOOKWOOD

.... DOLLARS
at the office of the State Bank of Stookwood, Ind., with interest at.......per cent. per annum.

The signers hereof severally waive all defence on the ground of any extension of time of payment of this Note that may be given to them or either of them, each signer hereof expressly consenting to any extension or extensions of time of payment which may be given by the legal holder hereof.

And to secure the payment of said amount we or either of us authorize, irrevocably, any attorney of any Court of Record, to appear for us in any such Court, in term time or vacation, at any time hereafter, and confess a judgment without process in favor of the holder of this note, for such amount as may appear to be unpaid thereon, together with costs, and Fifteen Dollars attorney's fees on the first One Hundred Dollars and Five per cent. on all in excess of One Hundred Dollars. And also to file a cognovit for the amount that may be so due and unpaid, and to waive and release all errors which may intervene in any such proceedings and consent to immediate execution upon such judgment, hereby ratifying and confirming all that my said attorney may do by virtue hereof.

Witness my hand and seal this....day of....19..
Due...... ....(Seal)
No....... ....(Seal)"

It will be seen that the note allows the time of payment to be extended indefinitely and also provides for a confession of judgment at any time. It has been held a number of times that both provisions destroy negotiability. However, the law on an indefinite extension of time of payment is not altogether uniform; the courts in some States hold that such an extension does not impair the negotiability of the instrument. Students should familiarize themselves with the decisions of the courts of their own State on this point. In the case of Wisconsin Yearly Meeting of Free Will Baptists v. Babler, 115 Wisconsin 291, where the note in question contained a clause authorizing a confession of judgment at any time, the court held "It is quite certain that the note was not negotiable, because by the power of attorney which it contained, judgment could be noted upon it at any time after its date, whether due or not." Thus, the time of judgment depends upon the whim or caprice of the holder and is absolutely uncertain. This deprives it of its negotiability.

CERTAIN OMISSIONS NOT AFFECTING NEGOTIABILITY.—The validity and negotiable character of an instrument are not affected by the fact that (Section 6):

1. It is not dated.
2. Does not specify the value given, or that any value has been given therefor.
3. Does not specify the place where it is drawn or the place where it is payable.
4. Bears a seal.

DATE OF A NEGOTIABLE INSTRUMENT. —The lack of a date is unimportant in an instrument unless it is in terms payable a certain period after date. If an instrument in this form were undated it would be an incomplete instrument which would have to be dealt with as provided in section 13.

WHEN DATE MAY BE INSERTED.—Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.

INSERTION OF WRONG DATE.—No question is likely to arise under this section where the true date is inserted after the issue of the instrument. The final sentence of the section, however, suggests an inquiry. The implication of the sentence is that the insertion of a wrong date will avoid an instrument in the hands of the original person who made the insertion; or in the hands of any one taking from him with notice or after maturity, for such a person is not a holder in due course. This seems a heavy penalty if the erroneous date was inserted without fraudulent intent, and on the supposition that the date inserted was the true one. Therefore, a date should not be inserted in an undated instrument unless one is perfectly sure that the insertion represents the true date.

VALUE RECEIVED.—Negotiable instruments usually state that they are for value received and this mode of expression is of great antiquity. The original theory of a bill of exchange, which was the earliest form of negotiable instrument, was based on the assumption that the purpose of the parties was to exchange a sum of money actually received by the drawer at his residence for a sum of money to be paid by the drawee at another place. Nevertheless, in recent times at any rate, even apart from statute, it has not been necessary to insert either such a general statement of consideration as the words for "value received," or a particular statement of the actual consideration given. The last paragraph of section 6 refers to certain special statutes in a number of States requiring that notes given for a patent right shall so state, and there are other statutes in a few jurisdictions requiring a statement of the consideration in notes given for lightning rods, or stallions, or to pedlers. Such statutes, however, are distinctly exceptional.

PLACE OF DRAWING OR PAYMENT.—A negotiable instrument need not state where it is drawn or where it is payable, because in the absence of such a statement the law is able to determine the place with accuracy. A bill is drawn or a note is made where it is delivered. It is payable at the usual place of business or residence of the person who should make payment. (See section 133.)

SEAL AND NEGOTIABILITY.—It was a rule of the common law that a sealed instrument could not be negotiable. This was due to the fact that under

the custom of merchants from which the law of bills and notes developed, such instruments were not sealed. When, however, business corporations became common, as they did for the first time in the nineteenth century, and especially when it was desired to issue series of bonds which should be payable to bearer and negotiable, the common law rule caused trouble. Some courts without the aid of statutes declared that mercantile custom had extended itself so that bonds payable to bearer became negotiable within the custom of merchants. But the matter was not so free from doubt, as a general proposition, as could have been wished. Subdivision 4, section 6, however, settles it.

WHEN AN INSTRUMENT IS PAYABLE ON DEMAND.—It has already been said that an instrument may be payable on demand. Section 7 of the statute provides that an instrument is payable on demand whether it is expressed to be so payable or at sight or on presentation, also when no time of maturity is expressed in an instrument or when it is negotiated after maturity. By a later amendment to the Negotiable Instruments Law the Massachusetts statutes have revived the sight draft as a distinct form of instrument, and the same thing has been done in New Hampshire, North Carolina and Rhode Island, but not generally. The only distinction between a sight draft and a demand draft in these States is that a sight draft is entitled to three days' grace, while neither demand paper nor time paper under the Negotiable Instruments Law is so entitled; the sight instrument is made identical with the demand instrument.

RIGHTS AGAINST PARTY TO OVERDUE PAPER.—The Negotiable Instruments Act closely connects overdue paper with demand paper and hence we must consider it at this point. In Section 7, it provides: Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand. Negotiable paper is not often issued or accepted when on its face overdue, but it is entirely possible and the statute in section 7, subdivision 2, provides for it. Indorsement of overdue paper, however, is common enough. The indorsee is not a holder in due course, and takes subject to defences, but he has rights against his indorser. In effect the indorsee has, so far as this last indorser is concerned, a right to treat the instrument as the indorsement of a new demand note, which may be presented within a reasonable time after the indorsement, even though it had been previously presented and dishonored, and may charge this indorser if the note is not paid on the subsequent presentment though other indorsers whose names were on the instrument before the dishonor would be discharged if due diligence had not previously been exercised.

WHEN IS AN INSTRUMENT PAYABLE TO ORDER.—It is, of course, fundamental that an instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. The Negotiable Instruments Law then provides in Section 8 that it may be drawn payable to the order of:

1. A payee who is not maker, drawer, or drawee.
2. The drawer or maker.
3. The drawee.
4. Two or more payees jointly.
5. One or some of several payees.
6. The holder of an office for the time being.

WHO MAY BE A PAYEE.—An instrument payable to A, or order, or payable to the order of A, is identical in legal effect; though an instrument in the latter form literally does not say that there is any payee until A makes an order to pay to someone, yet A is legally the payee. Not infrequently instruments are made payable on their face to the order of the maker himself, but an instrument in this form is not really a completed instrument, it only becomes so by indorsement; if the indorsement is to a particular person that person is in effect the payee of the instrument. If the indorsement is in blank the instrument is payable to bearer. Other kinds of payees besides those enumerated in section 8 are those enumerated in subdivisions 3 and 4 of the following section of the Act.

CHANGE IN COMMON LAW RULE.—Subdivision 6 of section 8 changed the previously existing rule of the common law. Until the passage of the Negotiable Instruments Law a bill or note payable to the "Treasurer of the A Company" was payable to the person who was treasurer at the time the instrument was delivered, and though he ceased to be treasurer, the instrument was still payable to him, and he alone could indorse it. Now such an instrument would

be payable in effect to the office of treasurer and whoever held that office at any time could indorse the instrument as treasurer.

JOINT PAYEES.—Under subdivision 4 of section 8, one of several promisees of a negotiable instrument payable to two or more jointly may receive payment or cancel the note. Thus, in the case of Park v. Parker, 216 Mass. 405, the facts were: In June, 1899, Caroline P. Gilham, William D. Park and Thomas C. Park, conveyed a tract of land in Boston, which they owned as tenants in common, to one Pihlcrantz, who gave a promissory note payable to the grantors, secured by a mortgage on the same real estate. The payees of the note died, Thomas C. Park in 1904, William D. Park in 1908 and Caroline P. Gilham in 1910. In 1911, the note was paid to the executor of the will of Caroline P. Gilham and the mortgage was discharged. This was a petition in equity by him for instructions as to what should be done with this money. He contended that the entire sum belonged to the Gilham estate, on the ground that the note was a joint one and that the mortgage was held by the three mortgagees as joint tenants and not as tenants in common, and that hence it all vested in Caroline P. Gilham as the last survivor of the three. This contention was the only question presented and the court held that "one of the several promisees of a negotiable instrument payable to two or more jointly may receive payment and cancel or surrender the note. Thus, payment by maker to the survivor of the joint payees was good and discharged his obligation."

WHEN AN INSTRUMENT IS PAYABLE TO BEARER.—A negotiable instrument is payable to bearer under the following conditions:

1. When it is expressed to be so payable.

2. When it is payable to a person named therein or bearer.

3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable.

4. When the name of the payee does not purport to be the name of any person.

5. When the only or last indorsement is an indorsement in blank.

FICTITIOUS PAYEES.—The first two subdivisions of section 9 present no difficulty, but the enactment in subdivision 3 that an instrument is payable to bearer when by its terms it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable, needs some comment. Let us illustrate that situation a moment: a firm in New York has an employee whose duty it is to buy goods, verify the bills for the goods, draw checks payable to the sellers of the goods, and bring the checks to the members of the firm for signature. This employee, desiring to commit a fraud, pretends that certain lots of goods have been received, and draws checks which he presents to his employer for signature, gets them signed, then indorses them and obtains the money. Now are those checks payable to bearer? If so, the bank which paid them has made a good payment. If they are not payable to

bearer, however, unless they are properly indorsed, the bank which pays them is not entitled to charge the payment against its customer's account. They are not payable to bearer because if the person to whom they were payable was fictitious that was not known to the drawer, the person making them so payable. Whether they were payable to the employee himself, so that his indorsement of them is valid, is then the question. He intended that the check should be used by him and in effect he intended to be the payee, but the drawer did not intend to make him so. We may suppose that the drawer in signing a check payable to X Y for goods had in mind that there was a genuine firm of that name or he would not have signed the check. If in fact there was a genuine person or firm of that name, it alone could indorse; if there was not a genuine firm, then nobody could indorse. The instrument would not be payable to bearer because the drawer did not know that the payee was fictitious. It would not be payable to the fraudulent clerk, or to any other existing person, because the drawer did not intend that the check should be payable to him.

OTHER INSTRUMENTS PAYABLE TO BEARER.—Section 9 also enumerates as payable to bearer an instrument where the payee does not purport to be the name of any person, as "cash"; and finally, where the only or last indorsement is an indorsement in blank. This provision involves at least an apparent conflict with section 40 of the Act. Section 40 provides that if an instrument payable to bearer is indorsed specially, it may nevertheless be

further negotiated by delivery. Suppose, then, an instrument is payable to bearer on its face, the holder of it indorses it specially to Y; Y loses the instrument, it is found by W, who sells it before maturity to Z, an innocent holder. Can Z sue on that instrument in spite of the fact that it is specially indorsed to Y? It would seem under section 40 that he can. The instrument, though payable to bearer and specially indorsed, may nevertheless be further negotiated by delivery. Contrast with that case the following: an instrument payable to the order of A on the face is indorsed by A in blank, and a subsequent holder, B, indorses specially to C; that instrument is also lost and picked up and sold to Z, a bona fide purchaser. Can Z here disregard the special indorsement and go back to the blank indorsement and claim under that as on an instrument payable to bearer? It seems he cannot do that, for section 9, subdivision 5, says an instrument is payable to bearer when the only or last indorsement is an indorsement in blank. In this case the last indorsement was a special indorsement; accordingly, the instrument when sold to Z was no longer payable to bearer, and Z, therefore, would have to get the indorsement of the special indorsee in order to get title. Section 40 probably does not affect this case, because the instrument was on its face payable to order—not to bearer. In other words, sections 40 and 9, subdivision 5, can only be made to avoid a contradiction of one another by confining the application of section 40 to instruments payable on the face to bearer and by holding such instruments as are cov-

ered by section 9, subdivision 5, not included. On strict theory a blank indorsement is a blank power authorizing the holder to insert his own name or that of anyone else as indorsee, but under the statute a blank indorsement is a little more than that; it is making the instrument payable to bearer, though the holder, by inserting the name of himself or of another person in the blank space above the indorsement name, may change the instrument from one payable to bearer to one payable to a special indorsee or order. The only practical difference between treating an instrument with a blank indorsement as payable to bearer or as giving a power to any holder is merely that on the latter supposition the instrument is incomplete until the power is exercised and the blank would have to be filled in before the holder could sue.

A DATE ON A BILL OR NOTE IS NOT NECESSARY TO ITS VALIDITY.—The date of an instrument is not so necessary to it that its absence avoids the instrument. The Negotiable Instruments Law provides that where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance, or indorsement as the case may be. Though the date written on a negotiable instrument is often important, it should be remembered that the instrument takes effect, not from the day it bears date, but from the day of delivery, and this is true of any obligation upon a negotiable instrument, whether that of maker, drawer, acceptor or indorser.

THE ANTEDATING OR POSTDATING OF NEGOTIABLE PAPER, INNOCENTLY OR FRAUDULENTLY.—The Negotiable Instruments Law provides that the instrument is not invalid for the reason only that it is antedated or postdated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery. This section suggests but does not answer the question, what is the effect of antedating or postdating an instrument for an illegal or fraudulent purpose. The implication from the section would be that such an instrument was invalid, but its invalidity could probably not be set up against a holder in due course. Suppose a note actually made and delivered on Sunday is antedated or postdated so that it shall appear to have been made on Saturday or Monday. In a jurisdiction where the Sunday law forbids doing business on that day, doubtless the instrument could not be enforced between the original parties, but one who purchased the instrument having no knowledge of the facts would certainly be justified in relying on the date as written. The mere fact that an instrument is postdated does not prevent one who takes it with knowledge of the fact from being a holder in due course.

WHEN BLANKS MAY BE FILLED IN.—Section 14 deals with the problem of filling in blank spaces. Before reading this discussion, turn to the section and read its provisions carefully. By filling in a blank we do not mean filling in a space carelessly left in the place where the amount of the instrument is

written, but the filling in of a space intentionally left. The statute makes express provision for this sort of thing in sections 13, 14, 15 and 138. In substance, the effect of these sections is that any holder in due course who takes the instrument after it has been completely filled in, can enforce it. The person who left the blanks is bound by the way they are filled in so far as the holder in due course is concerned, but any one who took the instrument while there were still blanks in it must at his peril find out what the actual authority is to fill in the blanks, and he can only recover to the extent that actual authority was given to fill in the blanks. The troublesome case is where the holder takes the instrument after the blanks have been filled in, but knowing that there had been blanks. Is that person bound to find out at his peril what the original authority was? That seems on the wording of the statute a doubtful case. These are the facts of a case that arose in England: the defendant signed blank forms of promissory notes and left them with his attorney, giving, however, the attorney no authority to complete and issue these notes until instructed by telegraph or letter from the maker. Nevertheless, the attorney, without further instruction, filled up the blanks, making the plaintiff the payee of the notes. The plaintiff bought the notes in good faith and for value, but he knew, nevertheless, that they had been signed in blank and had been left with the attorney; but the payee supposed the attorney was following the directions which had been given him by the maker. The plaintiff made no inquiry in regard to the attor-

ney's authority. He took it for granted that the attorney was acting properly. The English court held that the maker was not liable on those instruments. It seems like a pretty hard decision. Perhaps it might not be followed in this country. Nevertheless, the fact that there has been one such decision, and a decision under the English statute, which is identical with the American Negotiable Instruments Law, in the provisions controlling this question, makes the probability rather that way.

THE RULES OF CONSTRUCTION WHERE A NEGOTIABLE INSTRUMENT IS AMBIGUOUS.—The Negotiable Instruments Act has laid down rules for construction which are to be applied as follows (Section 17):

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount.

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof.

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued.

4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail.

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election.

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

APPLICATION OF THESE RULES.—The provisions of the preceding section in regard to construction are in the main self-explanatory. The figures which it is customary to put in a bill or note to indicate the amount are not regarded strictly as part of the instrument. If the amount is also written out in words, the figures are construed merely as a memorandum. So it was held in the People v. Lewinger, 252 Ill. 332, that altering the marginal figures of a check to make them correspond with the amount stated in written words which were not ambiguous or uncertain is not forgery. The 4th subdivision of section 17 states a rule of construction that is applicable not only to bills and notes but to all written contracts. The rule rests on the natural supposition that the parties are more likely to have overlooked or misread the printed matter in the form which they used than they are to have written what they did not intend. The typical case, which gave rise to the 5th subdivision, presented an instrument

in this form, "On demand I promise to pay B, or bearer, the sum of £15 value received." This was signed and addressed to J. Bell, to whom it was presented, and who wrote upon it "accepted, J. Bell." It was held that Bell was liable as an acceptor of a bill though the holder might, had he chosen, have sued the original signer of the instrument as the maker of a promissory note. The 7th subdivision follows the rule of the common law. The instrument as written is self contradictory, being signed by several persons, but beginning "I" promise to pay. If it read "we promise to pay," the obligation would be joint; that is, all the parties would have to be joined in an action. The use of the word "I," however, is thought to indicate an intent that each person shall be severally liable; therefore the makers of such an instrument may all be sued jointly or each of them may be sued separately.

LIABILITY OF PERSON SIGNING IN TRADE OR ASSUMED NAME.—Section 18 of the Negotiable Instruments Act provides that no person shall be liable on an instrument whose signature does not appear thereon, except in cases expressly provided for by the Act. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

FORM OF SIGNATURE.—This section applies to negotiable instruments a rule which the common law applied to sealed instruments but did not apply to oral contracts or to informal written contracts, namely, that a person who has ostensibly contracted

could not be shown to have been an agent for a principal whether the principal was disclosed or undisclosed. If, on behalf of his principal, an agent enters into a simple contract with another person, the latter can charge the principal on the agent's contract even though the agent did not announce that he was acting on behalf of his principal, and this fact was wholly unknown at the time to the person with whom he dealt. On the other hand in sealed instruments and in negotiable instruments, the person who signs the documents is the only party liable, and it is immaterial that the payee or other holders of the instrument know that he signed the instrument on behalf of his principal and in his principal's business. A name may be signed by mark or by any assumed name. It is sometimes supposed that we cannot change our names without the authority of court or legislature, but in fact anybody can assume any name he pleases; at least if he does so without fraudulent intent. It may take some time for an assumed name to become known as his, so as to give him a right to complain if other persons do not identify him as the one intended by the name, but he will incur liability without difficulty the very first time he uses an assumed name if he signs it to an obligation.

LIABILITY AS INDORSER.—The provisions of the sixth subdivision of section 17 are illustrated by the case of Moore v. Carey, 138 Tenn. 332, where the note read "I promise to pay," etc., and was signed by X and by Y in the order named, the note being payable to the order of Y. It was negotiated by Y to Moore

but was not indorsed by Y. It was held that it must be supposed that Y signed the instrument with the purpose of being bound, and that the only way he could be bound was as an indorser, and that it must, therefore, be concluded that he intended so to bind himself.

SIGNATURE BY AN AGENT.—The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

WHEN A SIGNATURE BY AN AGENT BINDS THE PRINCIPAL.—An agent may bind his principal by signing negotiable paper if (1) the agent had actual or apparent authority so to do, and (2) exercises the authority by a form of signature sufficient to charge the principal. A signature of the principal's name by the agent without any indication that the name was signed by an agent is sufficient, though business propriety requires that the instrument should state that the principal's name was signed "by A. B., Agent." A signature of the agent's name followed by the words "on account" of a named principal makes the instrument the obligation of the principal, so if made on "behalf of" or "for" a named principal.

LIABILITY OF PERSON SIGNING AS AGENT, ETC.—Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument

if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

DESCRIPTIO PERSONAE.—In contrast with the cases referred to under the previous sections are to be noted numerous cases where it is held that the mere addition of the word "agent" or such official designation as "President," "Treasurer," "Trustee," in the absence of words in the body of the instrument showing a different intent does not make the instrument the obligation of the principal or corporation, but the obligation is that of the agent or official personally. The addition to the signature is treated as matter of description like "Colonel" or "Professor." This result doubtless violates the intention of the parties in most instances. The reason for its adoption is that if the agent were not held personally liable, no one would be liable. The principal could not be because he is not named in the instrument, and, as has already been said, no one whose signature does not appear on the instrument can be held liable upon it. If, however, the body of the instrument states the name of the principal, the signature "A. B. Agent," will make the obligation that of the principal, not of the agent.

COMMENT ON SECTION 20.—Commenting on this section Professor Brannan in his recent book on the Negotiable Instruments Law says: "The plain language of this section indicates that it was the intention of the draftsman and the commissioners to

clear up the unnecessary and unpardonable confusion caused by the failure of some of the courts to exercise a little common sense and to recognize mercantile usage. Much of the difficulty found in this subject is purely manufactured and would not trouble a business man for a moment. He would perceive no difference between notes signed, 'The X Co., by A, Pres.,' or signed 'The X Co., A, Pres.,' or signed 'X Co., A, Pres.,' or 'A, Pres., X Co.,' or a note reading 'The X Co. promises to pay' and signed 'A, Pres.' Yet courts have been found to make distinctions in such cases. For instance, in Reeve v. First Bank, 54 N. J. L. 208, 23 Atl. 853, 16 L. R. A. 143, a note signed 'Warrick Glass Works, J. Price Warrick, Prest.,' was properly held to be the note of the corporation, and not the note of Warrick or the joint note of Warrick and the corporation; so also in Aungst v. Creque, 72 Oh. St. 551, 74 N. E. 1073. Whereas in McCandless v. Belle Plaine Co., 78 Iowa, 161, 42 N. W. 635, 4 L. R. A. 396, it was held that such a note is the note of the signer, that oral evidence was not admissible to show that the corporation alone was intended and that both were liable. And in Day v. Ramsdell, 90 Iowa, 731, 52 N. W. 208, a note reciting that, 'We, the A. B. Co., promise to pay,' but signed merely by two persons describing themselves as President and Secretary, was held to be their individual obligation. In 17 Banking Law Journal, 305-306, it was properly said that 'nine business men out of ten would regard such a note as that of the company,' and it would hardly be an exaggeration to include the tenth man. The same

New Jersey court that decided Reeve v. First Bank, supra, also said in the same case that a note signed 'J. Price, Pres. Warrick Glass Works,' nothing appearing in the body of the note indicating who is the maker, is prima facie the note of J. Price. Here again a business man would regard this as a note of the company. In Miller v. Roach, 150 Mass. 140, 22 N. E. 634, 6 L. R. A. 71, a note reciting 'We promise to pay,' was signed 'John Roach, Treas.' Stamped on the paper was the impression of a large circular seal, around the edge of which was printed the name of a company so placed that the circumference passed through the final letter of Roach and the word treasurer. This was held to be the note of the company. Whereas in Dutton v. Marsh, L. R. 6 Q. B. 361, where a note reciting 'We, the directors of the A. B. Co., promise, etc.,' was signed by four persons, one of whom added the word 'Chairman' after his name, with the company's seal in the corner, it was held that the signers were individually liable, that the affixing of the seal was not enough to exclude personal liability and to show that it was the company's note. Distinctions have been made between the case of a note signed 'A. B. Agent, C. D. Co.,' and a note signed 'A. B. Agent for C. D. Co.,' it being held that in the former case A. B. was personally liable, in the latter that he was not. Barker v. Mechanic Ins. Co., 3 Wend, 94. Here again a business man would see no distinction. He would regard both signatures as being made on behalf of the company.

"In some states where the name of a company is

printed at the head or on the margin of the instrument and the note is signed 'A. B., Pres.,' for instance, the instrument has been held to be sometimes presumptively, sometimes conclusively, the instrument of the company. Second Bank v. Midland Co., 155 Ind. 581. See also, Carpenter v. Farnsworth, 106 Mass. 561, where the court said (p. 562): 'The court has always laid hold of any indication on the face of the paper, however informally expressed, to enable it to carry out the intention of the parties.'

"On the other hand, the contrary has been held in C. N. Bank v. Clark, 139 N. Y. 307, and First Nat. Bank v. Wallis, 150 N. Y. 455. Some courts have treated the instruments in some of these cases as ambiguous and have admitted parol evidence to show the intention of the parties. It is submitted that a court wishing to construe the language of section 20 in accordance with the evident intention of the draftsman and not disposed to interpret it with a desire to adhere to any former rule in the State, ought to find little difficulty in these cases. Section 20 is taken from section 26 of the Bills of Exchange Act, but is made stronger by the addition of the words 'where the instrument contains,' which are not to be found in the section of the Bills of Exchange Act. Notes signed by individuals with the addition of such words as agent, president, secretary and the like, without disclosing any principal, either in connection with the signatures or in the body of the instrument, naturally had to be treated as the notes of the individuals because the doctrine of undisclosed principal had not

been applied to contracts made in the form of negotiable instruments, and therefore, unless the signer could be held the notes would be invalid. This limitation of the doctrine of undisclosed principal was proper because that doctrine would impair the value of the negotiable instruments for purposes of circulation. But it seems a narrow view and not in accordance with mercantile understanding to impose individual liability upon a signer who, being duly authorized to sign, discloses the name of a principal on the instrument, and indicates that he himself is an agent or officer, without regard to the form in which this is done. And it is submitted that such a person is within the meaning of the words of section 20 providing that 'where the instrument contains, or the person adds to his signature, words indicating that he signs for or on behalf of a principal or in a representative capacity, he is not liable on the instrument if he was duly authorized.' In most of the cases decided since the act, the courts have construed the act in this reasonable manner, but some courts unfortunately have seemed unwilling to depart from the old rule of the State, where it was different, and have held that the statute makes no change."

CHAPTER II

Consideration

CONSIDERATION IN SIMPLE CONTRACTS.—As to what is consideration, the rules of negotiable paper are in general identical with those of simple contracts, and it is, therefore, necessary to define briefly, what consideration is necessary to make a simple contract binding—that is, what is necessary to make an ordinary promise legally enforceable as a contract. The promisee must give something or promise to give something to the promisor in exchange for his promise, which he has assented to receive as the price for his promise; and the thing so given or promised as consideration must be something to which the promisor was not previously entitled. Doing or promising to do something which one was previously legally bound to do is not sufficient consideration. The thing given or promised as consideration need not, however, be tangible, it may be the surrender of a right or the forbearance to enforce a claim; but the surrender of a claim known to be invalid or the forbearance to prosecute a claim known to be unfounded is insufficient.

CONSIDERATION ILLUSTRATED.—Citing with approval the English case of Currie v. Misa, L. R. 10 Exch. 153, the New York Court of Appeals in Hamer v. Sidway, 124 N. Y. 538, defines consideration as follows: "A valuable consideration, in the sense of the law, may consist either in some right, interest,

profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Perhaps this gives a better idea of consideration than any other single definition, although it is common to find consideration defined simply as a benefit to the promisor or a loss or detriment to the promisee. The consideration which is necessary to support a negotiable document need not be a pecuniary one or even a beneficial one. The facts in the case of Hamer v. Sidway are instructive as showing the method of applying the definition we have given to an actual case. It appeared that, at the celebration of the golden wedding of Samuel Story and his wife, in the presence of the family and invited guests, Mr. Story promised his nephew that if he would refrain from drinking, using tobacco, swearing and playing cards or billiards for money until he became twenty-one years of age, he would pay him $5,000. The nephew assented thereto and fully performed the conditions inducing the promise. When the nephew arrived at the age of twenty-one years, on the thirty-first day of January, he wrote to his uncle informing him that he had performed his part of the agreement and was thereby entitled to the $5,000. The uncle replied to this letter as follows: "Dear Nephew: Your letter of the 31st ult. came to hand all right, saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have five thousand dollars, as I promised you. I had the money in the bank the day you was twenty-one years

old that I intend for you, and you shall have the money certain. Now, Willie, I do not intend to interfere with this money in any way till I think you are capable of taking care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. The first five thousand dollars that I got together cost me a heap of work. * * * This money you have earned much easier than I did, besides acquiring good habits at the same time and you are quite welcome to the money; hope you will make good use of it. I was ten long years getting this together after I was your age. * * * Truly yours, W. E. Story. P. S. You can consider this money on interest." The nephew received the letter, and thereafter consented that the money should remain with his uncle in accordance with the terms and conditions of the letter. The uncle died on the 29th day of January, 1887, without having paid over to his nephew any portion of the said $5,000 and interest. The court found that the nephew used tobacco, actually drank liquor and observed that he had a legal right to do so. Applying the definition of consideration to these facts it held that he abandoned this right for a period of years upon the strength of the promise of the testator that for such forbearance he would give him $5,000. "We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of

his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it; but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been support the position we have taken." While this point is not decided by the case, it would be undoubtedly true that were a similar promise made by a father to his child that it would not be enforceable, as the child would not be giving up any legal right, since he owes the duty of obedience to his parent and hence there would be no consideration for such a promise. In the actual case the nephew did not owe this duty of obedience to his uncle.

THE ADEQUACY OF CONSIDERATION.—It is a very general rule in contract law that the adequacy or inadequacy of the consideration is of little or no importance. This is illustrated in the case we have just cited. To some it might appear that the acts from which the nephew refrained were wholly inadequate to support a promise on the part of the uncle to pay $5,000, but practically any act which is done by the promisee at the request of the promisor, no matter how trifling, is sufficient consideration for a promise. These principles apply equally to negotiable paper and to contracts in general. Such things as moral obligations, love and affection and the like

are not sufficient legal foundation to support a contract or a negotiable document. Thus in Gooch v. Gooch, 70 West Virginia 38, a promissory note given by a son to his widowed mother for money paid by her for his board while at college and for his college education, after such expenditure without promise or expectation of repayment on the part of either at the time of such expenditure, is not enforceable, because of want of consideration. It is true that love and affection are held to be sufficient consideration for a deed, but this is for the reason that upon the execution and delivery of the deed the title to the land passes and the contract is no longer executory.

CONSIDERATION IN NEGOTIABLE INSTRUMENTS AS COMPARED WITH THAT IN OTHER CONTRACTS.—Section 24 of the Negotiable Instruments Law provides that every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value. The rule stated in this section differs from that which prevails in regard to simple contracts at common law. In regard to such contracts the rule was, and still is in most States, that even in case of a written contract which is not under seal, the promisee when suing the promisor must allege and prove sufficient consideration to support the promise; nothing is presumed in the promisee's favor. In a few jurisdictions this rule has been changed in regard to all written contracts, making the rule similar in regard to such contracts with that

stated in Section 24 of the Negotiable Instruments Law. Though consideration is presumed prima facie to have been given for every obligation on a negotiable instrument, the truth may be shown by any party, and if when shown it appears that no value or consideration in fact existed, the defence will be good as against any one unless he be a holder in due course.

SATISFACTION OF AN ANTECEDENT DEBT IS SUFFICIENT CONSIDERATION.—Section 25 of the Negotiable Instruments Law provides that value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time. There are some differences, however, between the rules of consideration for negotiable paper and for ordinary simple contracts. In the first place, a negotiable instrument may be given for an antecedent or pre-existing debt. That is not so in the case of simple contracts. When we owe a debt and say verbally, "We promise to pay that," or make such a promise in writing, we could not be sued on the promise. The old obligation, of course, still exists, but the new promise creates no new liability, because nothing new is given in exchange for it. But in the case of a negotiable instrument, if there is an antecedent debt, the antecedent debt may be paid or may be secured by a negotiable instrument, and the negotiable instrument creates an immediate new obligation.

CONSIDERATION NEED NOT MOVE FROM THE PROMISEE TO THE PROMISOR.—There is another difference. In simple contracts the consideration must ordinarily move from the promisee to the promisor. It is something the promisee gives for the promise. That is not necessarily true in negotiable paper. In order to make a promise binding on a negotiable instrument it is essential either that the promisee shall have parted with something or that the promisor, the obligor on the instrument, shall have received something; but it is not essential that both shall concur. The promisee need not have given something to the obligor. Let us give an illustration: A wishes to pay C's claim against B, and A accordingly gives C his (A's) note in satisfaction of the C's claim against B. A has bound himself by that instrument though he has received nothing. C has given up something, his claim against B, and that is enough. Also, you may have a case where A, the maker, receives something, as where he at the request of B, to whom he owes money, gives a note for the amount to C instead of to B, who wishes to make C a present of the note. There A has received something, since he has been discharged from the claim that B had against him, but C, who holds that note, has given nothing for it. Yet he can recover on it. To repeat, then, if either the obligor has received something, or the holder has given something, there is sufficient value or consideration for a negotiable instrument.

WHAT CONSTITUTES HOLDER FOR

VALUE.—Section 26 provides that where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

CONSIDERATION ONCE EXISTING MAKES OBLIGATION PERMANENT.—A further feature of consideration in negotiable instruments is that if an instrument has once become binding, or if an obligation on an instrument has become binding, because the obligor has received value or a holder has given value, lack of consideration in subsequent transfers is immaterial, so far as concerns the liability of parties to the instrument at the time when value was given or received. To illustrate: A wishes, we will suppose again, to pay a debt B owes to C; A accordingly gives his own note to C, who receives it in payment. Now A has received nothing, but C has surrendered his claim against B, so the note is binding. Suppose, further, C gives that note to D—a pure gift. D now has given nothing for the note and A has received nothing for his promise on it, and yet the note is binding because it was binding in C's hands and D succeeds to C's rights; but if C transferred the note to D by indorsement, as a gift, D could not hold C liable as indorser for no value was ever given or received for that indorsement.

WHEN LIEN ON INSTRUMENT CONSTITUTES HOLDER FOR VALUE.—Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

PLEDGE OF AN INSTRUMENT SUBJECT TO A PERSONAL DEFENCE.—If a negotiable instrument which is subject to an equity is pledged as security for a debt, the pledgee, if a holder in due course, is protected to the amount of his advances. The following case will illustrate the law: Suppose the maker is fraudulently induced by the payee to sign a negotiable note for $1,000; the payee transfers this note to secure a note of his own for $500 which he borrows from the transferee. The lender, if he took the $1,000 note in good faith, can recover $500 on it, but no more. Now suppose the lender subsequently advanced a further sum of $200 on the faith of the $1,000 note. If this further advance was also made in good faith, without notice of the fraud, the lender could now recover $700 from the maker of the larger note. If, however, the $200 was advanced after notice of the fraud, the maker could recover only the $500 which was first advanced, as he was then acting in good faith, but could not recover the later advance.

EFFECT OF WANT OF CONSIDERATION.—Absence or failure of consideration is a matter of defence as against any person not a holder in due course; and partial failure of consideration is a defence pro tanto (to that extent), whether the failure is an ascertained and liquidated amount or otherwise. Though it is assumed until the contrary is shown that every party to a negotiable instrument has received value (Section 24) yet the truth may be shown (Section 28) and if in fact there was no value or consideration, the obligation cannot be en-

forced by any one except a holder in due course, and in dealing with the subject of consideration it must be remembered that each party is to be considered separately with reference to that point. There may be consideration so far as a maker of a note is concerned, but none so far as an indorser is concerned; for instance, if a maker borrowed money and subsequently the bank from which the money was borrowed got another person to indorse, the maker would have received consideration and the note would be binding as against him, but it would not be binding as against the indorser. If, however, the indorser received consideration later, when he put on his signature, he also would be bound; for instance, if the note had become due and the bank said that it might lie awhile unpaid if the maker would get an indorser, and the indorser came in and indorsed in consideration of the bank's forbearing to enforce the note for a time, that would be enough to make the indorser also liable.

THE SAME CONSIDERATION MAY SUPPORT SEVERAL PROMISES.—Although there must be consideration for the promise of each party, or he will not be bound, the same consideration may serve for several promises; for instance, if a bank says it will lend money on a note with two indorsers, and it does lend money on such a note, the money lent is a consideration not only for the maker's obligation, but for the obligation of each indorser. The bank demanded the price of several obligations for its one loan, and that one loan was consideration for all.

LIABILITY OF ACCOMMODATION PARTY.—An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. Of course lack of consideration is always a defence to an accommodation signature so long as the paper signed has not been transferred to some one who has given value for it. The name "accommodation signer" signifies that he has received no value for his signature, and unless the instrument gets into the hands of some holder who pays something there would be neither value received by the accommodating obligor nor value given by the holder. But as soon as a holder for value comes in, then you have the necessary element of consideration. It will not then make any difference that the accommodation party received nothing. It is enough that the holder has given something for the instrument; and it does not matter that the holder when he gave the value knew that the instrument was for accommodation. That is not knowledge of fraud or of any impropriety.

GIFT OF A NOTE—The great weight of authority at the present time is that one cannot make his own promissory note the subject of a gift to such an extent that it can be enforced by the donee against the donor either in the latter's lifetime or against his estate after his death. The reason for this is that the

note is but the promise of the donor to pay money in the future, and the gift is not complete until the money is paid. To make a valid gift there must be an immediate voluntary transfer of the property. The note is not an immediate voluntary transfer of the money but is simply a promise to pay the money and being a promise without consideration, it cannot be enforced and has no validity, nor is the note good against the donor's estate, because to constitute a valid gift causa mortis (a gift made because of fear of approaching death), there must be an actual subject matter capable of passing by delivery and an actual delivery of it in contemplation of death, and the note is simply the evidence of a promise to give the money at a future time. Similarly where the donor and donee occupy the relationship of parent and child, a note by the parent to the child is unenforceable as love and affection would be the only consideration to support the note and such is not a good consideration.

GIFTS MADE BY NOTES GIVEN IN AID OF PUBLIC OR CHARITABLE INSTITUTIONS.—A new church is being built and a subscription paper is passed around and fifty people sign it, setting opposite their names the amount which they will give toward the building fund. A, who signs for $1,000, gives his promissory note. This is really simply a case of a gift without consideration and the question arises, whether he (or should he die, his estate) is liable on it. The majority of American decisions hold that up to the point we have reached there is no consideration to support the subscription.

As has been said by the Court of Appeals of New York in the Presbyterian Church of Albany v. Cooper, 112 N. Y. 517, "It is, of course, unquestionable that no action can be maintained to enforce a gratuitous promise, however worthy the object intended to be promoted. The performance of such a promise rests wholly on the will of the person making it. He can refuse to perform, and his legal right to do so cannot be disputed, although his refusal may disappoint reasonable expectations, or may not be justified in the forum of conscience." Let us go a step further. After the subscription paper has been signed, the building committee sign a contract to purchase a lot and they employ an architect. Then the question arises, is A liable on his note, and the answer, according to the majority of cases, is in the affirmative. A subscription such as we have mentioned becomes binding as soon as the work towards which the subscription was promised has been completed or begun or liability incurred in regard to such work on the faith of the subscription or promissory note.

CHAPTER III

The Holder in Due Course

THE RIGHT OF THE HOLDER TO SUE.—The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument. We may here consider the amount which the holder of a bill or note may recover upon it if it is not paid at maturity. In the first place, the holder has a right against every party to the instrument for the full amount of it, if the parties secondarily liable are once duly charged; that is, on a note for $1,000, the holder, having charged the indorsers, may sue the maker and every one of the indorsers for $1,000 each, and get a judgment against every one of them for that amount. He will then try to collect as best he can. Of course, the holder cannot actually collect on his judgments more than the amount due him and keep it. If he should collect anything in excess of that which is due he will hold the excess in trust for the last party on the instrument.

WHAT CONSTITUTES A HOLDER IN DUE COURSE.—Before discussing the principles relating to a holder in due course, it is absolutely essential that the student should have in mind exactly what is meant by this term. While it is not ordinarily necessary for the student of law to commit to memory any set of rules, this is one instance where such a course is most desirable. The Negotiable Instruments Act sums up

in the shortest way possible the requisite elements of a holder in due course. One who has taken the instrument under the following conditions is such a holder in due course (Section 52):

1. That it is complete and regular upon its face.
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

IT IS IMMATERIAL WHAT THE HOLDER PAID FOR A NOTE.—It makes no difference what the holder paid for the note. If he is the owner of it and a holder in due course he may recover the full face of $1,000, even though he bought it for $500, and though originally it was obtained by fraud on the part of the payee; but if the price paid was very small, it is often some evidence in connection with other circumstances that [illegible] purchaser did not buy in good faith—that he suspected if he did not know that there was something wrong with the instrument.

IMPORTANCE OF BEING A HOLDER IN DUE COURSE.—As we have seen, personal defences are not good against a holder in due course (Section 57) and are good against one who is not a holder in due course (Section 58). It is therefore vital to determine when a holder falls within this designation.

THE INSTRUMENT MUST BE COM-

PLETE AND REGULAR.—The first requisite is that the instrument be complete and regular on its face. That, you see, makes every holder chargeable with what appears on the face of the instrument. If a holder does not in fact draw the inference of irregularity from something on the instrument which really shows irregularity, it is the holder's own fault. He is, in the language that is sometimes used, chargeable with constructive notice of whatever appears on the document itself. Thus it may indicate from its form that a fraud is being perpetrated on a corporation or partnership or the beneficiaries of a trust. Furthermore, the instrument must be complete when negotiated, in order to entitle one to the designation of a holder in due course. That, to some extent, changes the law from what it was prior to the enactment of the Negotiable Instruments Law. No one who takes a blank check can now be a holder in due course. Of course, if the instrument is given with authority to fill it out in a certain way, one who took the instrument and filled it out in that way would be protected, and one who took the instrument in blank and himself filled it out in accordance with the original authority would be protected (Section 14), but one who took it as a blank instrument, relying on the statement of the payee that it might be filled out for $1,000, when in fact the original authority was only to fill it out for $100, would not be able to collect more than $100. He is not a holder in due course, and is bound by the original authority given by the maker. It does not, however, make an instrument incomplete

and irregular that it is not dated, states no place of payment or does not state that it is for value received. (Section 6.)

KNOWLEDGE THAT BLANKS HAVE BEEN FILLED.—This suggests an inquiry as to the position of one who knows that the instrument was originally issued in blank, but who took it after the blank was filled in. Generally speaking, notice of any defence is enough to prevent one from being a holder in due course, and we should suppose it would be so here, although it seems a pretty harsh result. Suppose a blank check is brought to us and the payee says he has authority to fill it out for $1,000, and he does so and then offers it to us for $1,000. When we take it, it is complete and regular on its face, but we had notice that it was not so when it was issued. We think under the statute that it is a somewhat doubtful question whether one who thus took that instrument could be called a holder in due course. We should think it was too doubtful for it to be safe to take it in spite of the provision in Section 14 that the person in possession of a negotiable instrument wanting in any material particular, has a prima facie authority to fill up the blanks. One may then ask, what would be the position of a bank which took an instrument, a check from the payee, knowing that the payee had just filled out the blank? We think the answer must be the same as in the case where the check is purchased. If knowledge of a blank space is a notice of an infirmity in the instrument, it would seem as if the bank ought not to pay under those cir-

cumstances. We find it hard to believe, however, that a bank would not be protected if it paid such an instrument.

A HOLDER IN DUE COURSE MUST TAKE BEFORE MATURITY AND WITHOUT NOTICE OF PRIOR DISHONOR.— A second requisite stated in Section 52 for a holder in due course is that he must have become holder before the instrument was overdue and without notice that it had been previously dishonored, if such was the fact. The last clause refers to two cases: first, that of demand paper, which may in fact have been presented and dishonored though the purchaser has no reason to suppose so, and second, to the case of a time bill of exchange which has been presented before maturity for acceptance and acceptance refused. That is a dishonored bill, and any one who takes it with knowledge of that fact would not be a holder in due course; but one who takes it in ignorance of the previous dishonor and before maturity would be deemed a holder in due course.

GOOD FAITH AND VALUE.—The third requisite of Section 52 is that the holder must have taken in good faith and for value. Those words need no explanation other than the definition of value, previously given, and a statement in regard to the requirement of good faith. Good faith means, not such care as would be regarded as reasonable business prudence, but simply honest belief in the validity of the instrument, however careless it may have been to have such an honest belief. (Section 56.)

NOTICE OF INFIRMITY.—The fourth requisite of Section 52 is, perhaps, almost necessarily included in the one just referred to—that of good faith. The fourth requisite is that at the time of negotiation the holder must have had no notice of any infirmity of the instrument or defect in the title of the person negotiating it. A holder in due course was frequently called, before the passage of the Act, a bona fide purchaser for value before maturity, and that really expresses the whole idea, except, perhaps, the requirement of completeness and regularity on the face of the instrument. Until the contrary is shown, every holder is presumed to be a holder in due course. (Section 59.) Under this section it is not necessary for the holder to offer in the first instance any proof that he is a holder in due course. (16 N. Dak. 36.) But when it is shown that the title of a prior holder was defective, the burden shifts to the plaintiff. (165 N. Y. App. Div. 646; 162 N. Y. App. Div. 21.)

PAYEE MAY BE A HOLDER IN DUE COURSE.—The payee may be a holder in due course as well as a subsequent holder. This often becomes important. In a recent case a married woman made out a check payable to a man to whom she owed a debt. She gave this check to her husband with directions to hand it to the creditor in payment of her debt. The husband owed this same creditor a debt on his own account, and he handed that check to the creditor in satisfaction, not of his wife's debt, but of his own. The creditor preferred, when the difficulty was discovered, to treat the check as a payment of the

husband's debt, for the wife was responsible, financially, and the husband was not, and the court held the creditor was entitled to do this. Though he was the payee of the check and not the purchaser, he was a holder in due course, having taken it with all the requirements just discussed.

POSTDATED INSTRUMENT.—An instrument which is antedated or postdated is not on that account irregular on its face, and one may be a holder in due course of such an instrument. (Section 12.)

WHEN PERSON NOT DEEMED HOLDER IN DUE COURSE.—Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course. A check must be presented within a reasonable time after its issuance. What is a reasonable time depends on the time necessary to collect, and undoubtedly the customary mode of collection would be regarded as reasonable, even though that was not the quickest. The customary mode is not always the shortest method. In regard to notes, the rule is the same —a reasonable time from the issue of the note—only what is a reasonable time for a check is not necessarily a reasonable time for a note.

NOTICE BEFORE FULL AMOUNT PAID.—Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

RIGHTS OF ONE WHO HOLDS A NOTE FOR COLLATERAL.—Contrast with the case of a purchaser, a case where the holder at maturity holds the note merely for security. In that case, if the parties liable on the note—the maker and indorsers, or any of them—have a defence good against the person who deposited the note as collateral, the holder for collateral can collect only the amount for which he holds the note pledged; that is, if a note for $1,000 was deposited to secure a claim of $500, the holder could collect only that sum, because that satisfies his claim, if as we are supposing, the man who deposited the note as collateral, however, was not a holder in due course, and could not himself have collected anything from the parties liable on the instrument. If the man who deposited the note as collateral, however, was a holder in due course, the lender who holds the note as collateral will collect it in full and will pay over to the man who deposited the note the excess over and above the indebtedness.

WHO DEEMED HOLDER IN DUE COURSE.—Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title. This section (59) relates merely to the burden of proof. Prima facie

the holder of an instrument is a rightful holder, and a holder for value. When, however, it has been shown that an equity existed, the burden is then on the holder to establish that this equity has been cut off by the acquisition of the instrument at some time by a holder in due course.

WHEN A BANK IS A HOLDER OF A CHECK IN DUE COURSE.—Suppose a bank receives a check from a depositor and credits it to his account. Does the mere act of crediting it constitute the bank a holder in due course? The New York Court of Appeals has answered this in the negative in the case of Citizen's State Bank v. Cowles, 180 N. Y. 346, where the court said: "Plaintiff is not a holder of the check in due course, within the law merchant, as that term is now defined in the Negotiable Instruments Law, so as to render its title superior to the defences which the drawer of the check may have against the payees. Under the Negotiable Instruments Law, four elements must concur to constitute such a title (Section 52):

1. The instrument must be complete and regular on its face.

2. The holder must receive it before it is overdue, and without notice that it has been previously dishonored, if that is the fact.

3. It must have been taken in good faith and for value.

4. It must have been taken without notice of any infirmity in the instrument or defect in the title of the person negotiating it.

"If the plaintiff had not actually parted with value before it received notice of the dishonor of this check, it is apparent that at least one of these elements is lacking in the plaintiff's title. The authorities hold that the mere crediting to a depositor's account, on the books of a bank, of the amount of a check drawn upon another bank, where the depositor's account continues to be sufficient to pay the check in case it is dishonored, does not constitute the bank a holder in due course." If the bank should allow the depositor to draw against the check immediately after crediting it, the decision might well be the other way.

CHAPTER IV

Negotiation

WHAT CONSTITUTES NEGOTIATION.—We now come to the question of the negotiation of the various negotiable instruments. The Negotiable Instruments Act provides that: An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery. It will be seen that the law makes a distinction between paper which is payable to bearer and that which is payable to order. If payable to bearer, negotiation may be by delivery, while if payable to order, it must be by both indorsement and delivery. In considering this topic we must also bear in mind that under the definition of Section 9, other instruments than those in terms made payable on their face to bearer are classified in the law as payable to bearer. Thus, for example, a check which is payable to the order of "cash" is treated as a bearer instrument.

WHAT CONSTITUTES INDORSEMENT.—Norton defines "indorsement" as "the writing of the name of the indorser on the instrument with the intent either to transfer the title to the same, or to strengthen the security of the holder by assuming a contingent liability for its future payment, or both.

It strictly applies only to negotiable instruments." Section 190 adds that "Indorsement means an indorsement completed by delivery." We have already discussed the nature of delivery. One illustration should suffice to make clear this point. Suppose, as in Clark v. Boyd, 2 Ohio 279, A holds Green's note. He indorses it to Smith and leaves it among his, A's papers, where it is found after his death. Smith would have no title to the note. The indorsement had not been completed by delivery. The note was the property of A at all times before his death; he could have cancelled his indorsement had he so desired, and his executor or administrator has no authority to make the delivery for him.

WHO MAY NEGOTIATE.—When negotiation of a negotiable instrument is by delivery, the delivery may be by anybody. Even a thief or a finder can make an effective delivery of an instrument payable to bearer, so that a holder in due course will get an indefeasible title. On the other hand, if an instrument is payable to order, the indorsement must be by the person entitled to the instrument; no other indorsement will do.

HOW THE INDORSEMENT IS MADE.—The Negotiable Instruments Act provides that "the indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement." (31) An acceptance of a bill of exchange is the only obligation in negotiable instruments which is not required by law to be upon the instrument itself.

The proper place for the indorsement is on the upper end of the instrument on the reverse side, but as we have already seen in regard to the forms of negotiable paper that no set form is absolutely necessary for their validity, so likewise no set place is absolutely necessary for the indorsement. In the case of Haines v. Dubois, 30 N. J. Law 259, the court said: "If the payee write his name on any part of the note with the intention of indorsing it, it is a sufficient indorsement. An indorsement, as the word imports, is usually put upon the back of a note; that is the regular mode, but the place where written is by no means essential." It sometimes happens, however, that the back of the instrument does not contain sufficient room for all the indorsements or there may be some other particular reason why it is not possible to place indorsements on the back. In the case of Crosby v. Roub, 16 Wis. 616, the court said: "Suppose the consideration for the ordinary indorsement was a sale of real estate, and the parties desired to express the consideration. It might be wholly unnecessary, yet no one could question their right to do so. Suppose the description of the real estate was too long to be written on the back of the note, and they write the indorsement on another paper containing the full description, and attach it to the note, could it be for a moment contended that it would not pass the title? I think not." Where the indorsement is thus made on a separate piece of paper, it must be attached to the instrument itself and is what we call an "allonge." This practice has been recognized by the Negotiable Instru-

ments Act, and in Section 31 it is provided that the indorsement must be written on the instrument itself or upon a paper attached thereto.

IRREGULAR INDORSEMENT.—Sometimes the holder of negotiable paper attempts to transfer it by a method different from that of regular indorsement, as, for example, writing where the indorsement should be, "I hereby assign the within note to John Jones," or as in the case of Sears v. Bates, 47 Iowa 658, the indorsement read: "December 18, 1876, I hereby assign all my right and title to Louis Meckley. John Bowman." While the cases do not all agree, it is quite generally held that the person who indorses in this irregular manner instead of intending the instrument to pass by the law of assignability with all of the incidents of assignability, really intends the transfer to be with the ordinary results of a regular negotiation by indorsement. The usual business way is by indorsement and it is probable this is what the party thought he was doing; so it is generally held that expressions similar to the above, unless they show clearly an intention to exempt the transferor from an indorser's liability, are to be considered indorsements. Although the case of Sears v. Bates was decided prior to the Negotiable Instruments Act, it has been held in a number of well-considered decisions that under the Act, indorsement in such form is good. On the other hand, in Ireland v. Floyd, 42 Oklahoma 609, where the alleged indorsement read: "For value received, I hereby ***guarantee*** payment of the within note and waive demand and notice of protest on same

when due," it was held that it was not an indorsement. This is in keeping with most of the authorities as an indorsement is an entirely different contract from that of guaranty. An indorser's contract is conditional. The necessary steps must be taken in order to hold an indorser on his contract while no steps are necessary in the case of a guarantor.

INDORSEMENT OF A PART OF THE INSTRUMENT.—Suppose A holds a note payable to his order for $500. He indorses it as follows: "Pay to the order of B $250 on the within note." The question arises whether such an indorsement is good. As an indorsement it would be inoperative because Section 32 of the Negotiable Instruments Act reads: "The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue." The reason for the rule is plain. If A could transfer $250 to B, it would be possible to transfer the entire note to five hundred different people, $1 to each person, and in that way subject the maker to five hundred law suits. Such a condition would be intolerable. Courts of common law do not generally recognize any assignment of a part only of an entire demand. While such an assignment may be good between the parties, the assignee would not have any standing in court to enforce it against a

debtor who had not consented to the assignment. Of course, where there is a partial assignment to several persons, the debtor cannot make any objection provided all of the assignees get together and join in one common suit against him for the full amount of the claim. Sometimes a note is paid off in installments and each payment noted on the back of the instrument. If a note for $1,000 is to be paid off in quarterly payments and $750 has been paid, of course the holder may indorse the remaining unpaid portion of the note. $250 is all that is due at the time of the indorsement of the whole instrument. As we shall see later, an indorsement dates as of the time it is placed on the instrument. An important limitation, therefore, on the rights of one to whom the holder purports to indorse a part of the instrument is that he would not be given the privileges of a holder in due course. Like any assignee of a chose in action (that is a contract right) he would be subject to all personal defences or equities which prior parties to the instrument might have.

KINDS OF INDORSEMENT.—The Negotiable Instruments Law provides for six kinds of indorsement (Section 33):

1. Blank indorsement.
2. Special indorsement.
3. Restrictive indorsement.
4. Qualified indorsement.
5. Conditional indorsement.
6. Irregular indorsement.

We are thus led to consider the liability of the various kinds of indorser. As we have seen, an in-

dorsement must be written on the instrument itself or on a paper attached thereto. A writing on a detached paper cannot be an indorsement. (Section 31.) Normally the payee is the first indorser. The statute says an indorsement may be either special or in blank; it may be restrictive, qualified or conditional. The additional kind may be called an anomalous or irregular indorsement. The meaning of a special indorsement as distinguished from an indorsement in blank is, of course, plain. The indorsement in blank in effect makes the instrument payable to bearer. The special indorsement defined in Section 34 makes necessary the signature of the special indorsee for further negotiation. A blank indorsement may be converted by any holder into a special indorsement by writing over the indorser's signature the name of the indorsee desired. An indorsement is an order. It is sometimes said to be the drawing of a new bill on the drawee or maker; at any rate, it is an order on him. The full form of indorsement is, "Pay to the order of," just the words the drawer of an instrument uses, and the person ordered to pay is the drawee or maker. Though this order does not say so in terms, by mercantile custom it operates as an assignment or transfer of the instrument, and also operates to create an obligation to pay the indorsed instrument, if dishonored by the primary party, on receiving due notice of the dishonor. Before studying the various kinds of indorsements examine carefully the forms on page 179.

SPECIAL INDORSEMENT.—A special indorsement specifies the person to whom or to whose

order the instrument is to be payable and the indorsement of such indorsee is necessary to the further negotiation of the instrument. Let us assume that the negotiable document reads: "Pay to the order of John Jones." He wishes to indorse it specially. He does this on the back as follows: "Pay to the order of William Green. John Jones." If William Green is to transfer the paper he must indorse it in order to make the negotiation valid. However, sometimes the indorsement reads this way, "Pay to William Green. John Jones." Such an indorsement raises the question whether in the indorsement itself words of negotiability are necessary as they are in the body of the instrument. The indorsement in such form does not affect negotiability of the instrument, for Section 36 further provides that the mere absence of words implying power to negotiate does not make an indorsement restrictive, so that for the purpose of negotiation both of the above forms of indorsement have the same effect.

INDORSEMENT IN BLANK.—An indorsement in blank specifies no indorsee and an instrument so indorsed is payable to bearer and may be negotiated by delivery. The mere writing of the payee's name on the back of the instrument is all that is required. Care should be taken in the use of the blank indorsement. Although it is commonly used, it is dangerous if there is any possibility of the paper being lost or stolen. For example, A has a check payable to his order and he simply writes his name across the back, mails it to a person who has agreed to accept

it in payment of a bill A owes him. The letter is lost, gets into the hands of X, who keeps the check. Of course, the check is of no value to X personally. X, however, takes it to someone and persuades that person to cash it for him. That person does it in good faith, believing that X came by it rightfully. The purchaser is therefore a holder in due course and he would be able to collect on the check. What A should have done when he sent the check to his friend was to have indorsed it specially. Similarly, if a person is in the habit of depositing his checks in a bank and sending the pass book with the checks by an office boy, and some of the checks are lost and get into the hands of a holder in due course, the holder may collect on them. Section 35 gives certain privileges to the holder who has negotiable documents with a blank indorsement on them. "The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement." The important words of Section 35 which we have just quoted are: "consistent with the character of the indorsement." Suppose, for example, Smith makes his note payable to the order of John Brown. John Brown indorses in blank by simply writing his name across the upper reverse side when he delivers it to William Green. Under the Act Green may then write above John Brown's indorsement: "Pay to the order of William Green." Should the paper then be lost, either in the mail or by the office boy's taking it to the bank for deposit, it would not be good in any-

body else's hands until the necessary indorsement was placed on it. We see, then, that to "specialize" an indorsement is not to change the character of the instrument. But suppose instead of doing this the holder writes above the blank indorsement: "I hereby guarantee the payment of the within note." This is not consistent with the character of the indorsement. As we have said before, an indorsement is not a guaranty and the holder would have no right under this section of the Act to change the character of indorsement to one of guaranty. This would constitute a material alteration and it would destroy the instrument in the hands of the party who made this change.

WHAT IS A RESTRICTIVE INDORSEMENT?—The various forms of the restrictive indorsement are those which either:

1. Prohibit the further negotiation of the instrument; or
2. Constitute the indorsee the agent of the indorser; or
3. Vest the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive. (Section 36.)

An illustration rather than the definition contained in the Act will give a better idea of what the restrictive indorsements are. (Students should make themselves thoroughly familiar with the several ex-

amples of indorsements which are set forth on page 179.) As an illustration of subdivision 1:

"Pay to the First National Bank only.
Robert Smith."

Of subdivision 2:

"For collection
The Smith Manufacturing Co.
By William Green, Treas."

The expression "for deposit" is also used under this subdivision.

Of subdivision 3:

"Pay to the the order of Mrs. Mary Hook, for the benefit of her son Charlie, J. P. Haskin."

The last paragraph of subdivision 3 means that if the instrument is drawn to the order of A and he indorses it "Pay to B," it does not restrict the further negotiation of the instrument although the words "or order" are not included in the indorsement.

THE EFFECT OF A RESTRICTIVE INDORSEMENT AND THE RIGHTS OF THE INDORSEE.—The Negotiable Instruments Law provides that a restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring;
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement

THE INDORSEMENT FOR A PARTICULAR PURPOSE.—This is one of the forms of the restrictive indorsement and is illustrated by the leading New York case of Hook v. Pratt, 78 N.Y. 371. This action was brought on a draft which was in the following form:

"$5,000. Syracuse, N. Y., September 13, 1872.

"Orrin Welch, Treasurer Morris Run Coal Co. Pay to the order of myself, one year after date, five thousand dollars; for value received.

(Signed) J. P. Haskin."

Indorsed: "Pay to the order of Mrs. Mary Hook, 35 King, for the benefit of her son Charlie.

(Signed) J. P. Haskin."

The court held that: "The only effect of such an indorsement, by way of restriction, is to give notice of the rights of the beneficiary named in the indorsement, and protect him against a misappropriation. When a bill is indorsed, 'Pay to A or order for the use of B,' A cannot pass the bill off for his own debt, but he can by indorsing it transfer the title, and will hold the proceeds for the benefit of B, and be accountable to him for them."

INDORSEMENT FOR COLLECTION.—The commonest case of a restrictive indorsement is an indorsement for collection. Such an indorsement vests the indorsee with title and a right to bring any action the indorser could bring, and enables the indorsee to transfer his rights to another; but the person to whom the instrument is thus transferred by the restrictive indorsee will also be restricted to the same extent;

that is, if an indorsee of paper for collection, transfers it to somebody else, that subsequent transferee is also restricted and holds the instrument for collection. The question frequently arises whether an indorsee after the indorsement, "Pay any bank or banker," should require a guaranty of prior indorsements. Because it has been held by a majority of courts that such indorsement is agent-creating and not title-conveying, it would seem that it is necessary for such indorsee to require a guaranty if it is desired to rely upon the responsibility of the collecting bank which holds the instrument under such restrictive form of indorsement. However, this can be modified to this extent, namely, that, in those jurisdictions, as, for example, in Nebraska, where the indorsement, "Pay any bank or banker" has been held to be title-conveying, the necessity of such special guaranty can technically be dispensed with, as it will not give added protection to the indorsee. Under such circumstances, the special guaranty of prior indorsements will, of course, do no harm.

INDORSEMENT WITHOUT RECOURSE.—The use of the expression "without recourse" is the common way to make a qualified indorsement. The Negotiable Instruments Act defines a qualified indorsement as one which "constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words 'without recourse,' or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument." It will be seen

that the qualified indorsement constitutes the indorser a mere assignor. It does not follow that the indorsee is a mere assignee who takes subject to all the equities. Thus, should a thief transfer negotiable paper by the indorsement without recourse he would nevertheless be liable to the indorsee because Section 65 of the Act provides that, "Every person negotiating an instrument by delivery or by qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be;
2. That he has a good title to it;
3. That all prior parties had capacity to contract;
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless."

ANOTHER METHOD OF MAKING A QUALIFIED INDORSEMENT.—While the usual method is by the expression "without recourse," the expression "I hereby transfer and assign all my right, title and interest in and to the within note" or "I transfer my right, title and interest in the same" have been held by a number of courts to constitute a qualified indorsement. Such a decision has been rendered in North Carolina in the case of Evans v. Freeman, 142 N. Car. 61, and a contrary decision has been given in Thorp v. Mindeman, 123 Wis. 149, so that a matter of this kind gives us another illustration of a conflict in the law of the various jurisdictions. Although these decisions are under the Negotiable Instruments

Law, investigation of the court decisions in the particular State governing the indorsement would be necessary in order to settle a question of this kind.

CONDITIONAL INDORSEMENTS.—A conditional indorsement is not commonly seen. The Negotiable Instruments Law provides that, "Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally." An illustration of one would be an indorsement which reads: "Pay to the order of X Y if A B goes into bankruptcy," or one which is subject to any other condition. It might be thought such an indorsement would be invalid altogether, but the statute provides that the party primarily liable on such an instrument may either disregard the condition or recognize it; but if the condition is disregarded and payment made though the condition has not been fulfilled, the person who receives payment will hold it subject to the condition. In the case we put, where the instrument was indorsed to X Y if A B becomes bankrupt, the maker of the instrument might pay X Y safely, whether A B becomes bankrupt or not, but X Y would have to hold that payment in trust for the person from whom he received the instrument, unless A B did in fact become bankrupt (Section 39).

CONDITIONAL DELIVERY.—We have seen

that Section 16 of the Negotiable Instruments Act provides for a conditional delivery. An analysis of the facts in a recent New York case will give us a thorough understanding of this method of delivery. The facts in the case of Smith v. Dotterweich, 200 N.Y. 299 are as follows: on the 28th of February, 1901, Dotterweich executed and delivered to Smith a promissory note for $3,740, payable in six months, and when it became due, it was renewed by four notes dated August 28, 1901, and payable in six months from that date. These notes not being paid when due, plaintiff brought suit on them and the defendant alleged that there was an oral agreement by which these notes were not to become valid unless the plaintiff should secure for the defendant a certain amount of money. The court said: "The question now before us is whether the testimony of the defendant, supplemented by such legitimate inferences therefrom as are most favorable to him, is of sufficient weight and probative force to create a question of fact for the jury; and that question obviously depends upon the nature and effect of the oral agreement to which he testified. If that agreement, which for present purposes must be assumed to have been made, created a condition precedent, without the performance of which the notes never became valid obligations in favor of the plaintiff, then there is a question of fact for the arbitrament of a jury. The converse of the proposition is equally simple. If the effect of that agreement was to engraft upon a valid contract a condition subsequent, the learned trial justice was

right in ruling that the issue was one of law for his decision. A careful analysis of the defendant's testimony has convinced us that he is right in the contention that the case should have been sent to the jury. He testified that he told the plaintiff that under no consideration would he take the insurance unless the plaintiff would guarantee to make him the loan; that the plaintiff told him to sign the note, which would be held in the plaintiff's safe until the deal was closed; that if it was not closed the note would be returned to the defendant and the policy would be returned to the plaintiff; that the policy would be null and void if the plaintiff did not get the loan for the defendant and that both of them would be taking the same chance. If these statements mean anything, they plainly import a condition which was to be performed before the transaction, witnessed by the delivery of the note to the plaintiff and the delivery of the policies and receipts to the defendant, was to be regarded as consummated and binding. That condition was the procurement of the loan which, concededly, was never made. Giving to the defendant's story a fair, natural and unstrained interpretation, we have a case in which there is failure of the precise condition which must determine the existence or non-existence of any contract between him and the plaintiff. * * * There are many decided cases upon this branch of the law both in this State and in other jurisdictions, but we shall refer to only a few as illustrating the line of cleavage between the case at bar and the case of Jamestown Business College Ass'n v. Allen, 172 N.Y. 291. * * *

In Benton v. Martin, 52 N.Y. 570, this court very clearly enunciated the rule which has always obtained in this State: 'Instruments not under seal may be delivered to the one to whom upon their face they are made payable, or who by their terms is entitled to some interest or benefit under them, upon conditions the observance of which is essential to their validity. And the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between the parties to it, or others having notice. It needs a delivery to make the obligation operative at all, and the effect of the delivery and the extent of the operation of the instrument may be limited by the conditions with which delivery is made. And so also, as between the original parties and others having notice, the want of consideration may be shown.' This quotation sums up the whole of the law applicable to the case at bar in its present state. * * * The case of the Jamestown Business College Ass'n v. Allen, supra, is a salient illustration of the converse of this rule. There the promissory note was rendered effective and complete by an unconditional delivery. The payee agreed to release the maker, and to cancel the note, upon a future contingency which might or might not arise. That was clearly a condition subsequent which brought the case within the general rule that a contract reduced to writing and complete in its terms, cannot be varied and contradicted by oral testimony. * * * Thus, to state the difference most concretely, the case at bar is one in which the oral testimony tends to show that

the writing purporting to be a contract is in fact no contract at all, while in the case of the Jamestown Business College the oral testimony was in direct contradiction of the written contract as to the existence and validity of which there was no controversy."

INDORSEMENT OF AN INSTRUMENT PAYABLE TO BEARER AND THEREAFTER SPECIALLY INDORSED.—The Negotiable Instruments Act provides that "where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement." Commenting on this, Norton says: "An instrument, payable to order, upon which the only or the last indorsement is in blank, may be specially indorsed. The effect of such an indorsement is that the instrument ceases to be transferable by delivery and requires the indorsement of the special indorsee for its transfer. An instrument payable to bearer on its face may also be specially indorsed; but the instrument, notwithstanding the special indorsement, continues transferable by delivery. The special indorser, however, is liable only to persons who make title through the indorsement of his special indorsee; i.e., to persons holding under the blank or special indorsement of such indorsee, or of his indorsee, etc. Suppose, for example, the following to be a series of indorsements: (1) John Smith. (2) Pay to the order of Thomas Robinson. Richard Roe. If the instrument upon which these indorsements appeared were one on its face pay-

able to order, no person in possession of it would be entitled as holder to charge either the maker, or John Smith, the first indorser, or Richard Roe, the second indorser, except Thomas Robinson, the special indorsee. But if the instrument were on its face payable to bearer, any person in possession of it would be the holder, and as such entitled to enforce the obligations of the maker, and of John Smith, who indorsed in blank. No one, except Thomas Robinson, could charge Richard Roe, the special indorser."

INDORSEMENT WHERE PAYABLE TO TWO OR MORE PERSONS.—Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others. Where two or more persons own property, title can only be transferred when all agree to transfer it. The provisions of Section 41 simply apply this to the law of negotiable paper; and the exception to the general rule stated in Section 41 also applies to all property, subject, however, to one qualification. Partners have authority to act for one another and for the firm in the firm business. Therefore, under the doctrines of agency, one partner may indorse for the firm, and so in other than partnership cases, if one payee has in fact authority to act for the others, he may do so. The single qualification to which allusion has just been made relates to trustees. One trustee cannot delegate power to another to do any act which requires the exercise of judgment; therefore though one trustee might authorize another to indorse nego-

tiable paper for collection, he could not transfer by way of sale negotiable paper belonging to the trust, even though authorized by his trustees to do so. The signature of all would be necessary.

EFFECT OF INSTRUMENT DRAWN OR INDORSED TO A PERSON AS CASHIER.—Where an instrument is drawn or indorsed to a person as "Cashier" or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer. Suppose A does business as the Boston Hat Company and gets a check or note payable to the Boston Hat Company. Ordinarily and normally he would indorse that in the name of the Boston Hat Company, but if he did not want to do so, he might indorse it in the name of A. The Boston Hat Company is the name under which A does business. It is a business designation of A. If the Boston Hat Company were really a corporation, then the instrument would have to be indorsed in the name of the corporation, for the corporation would be a different person from A, although A might own all the stock in the corporation; but the mere designation "the Boston Hat Company," if there is no corporation, does not create a separate person. The Boston Hat Company is A, and A, therefore, may indorse, since he is the real payee and holder.

INDORSEMENT UNDER NAME DIFFERING FROM THAT ON INSTRUMENT.—What

is the case if an instrument, on its face or by indorsement, is made payable to the order of a single woman by her maiden name and she marries? Her indorsement in her married name is all right. She is the owner and payee, or indorsee, of that instrument and can give a good title in her own name. So if a person changed his name otherwise than by marriage he could indorse in his new name and transfer title to negotiable paper which was payable to or indorsed to him in his old name. He naturally would not do that; he would seek to avoid question by using the name, so far as possible, under which he was designated in the negotiable paper, but he has the legal power to use his real name. Sometimes in order to make his right abundantly clear, he indorses in both names.

INDORSEMENT BY ONE HAVING NAME IDENTICAL TO PAYEE'S.—On the other hand, even though a person has an identical name with that of a payee or indorsee of paper, he cannot transfer good title to it if he is not really the person intended as payee or indorsee. Suppose a check is payable to John Smith, and by mistake it is delivered to the wrong John Smith, and we will even go so far as to suppose that the man to whom it is delivered thinks that it was intended for him; still his indorsement will not give good title even to a holder in due course, nor will it protect a bank which pays on the faith of it. In this respect the law in this country is more severe than the English or German laws. Both the English and German laws protect a bank which pays

in good faith an instrument apparently regular in drawing and indorsing, even though the indorsement be made by the wrong person or even though it is forged.

IMPERSONATION.—We may suppose one other case of indorsement where the indorser's name is not apparently that on the face of the instrument. Suppose X comes to A and by stating that he (X) is Y (a case of false and fraudulent misrepresentation) induces A to give him (X) a check payable to Y. It is generally held that such a check is really payable to X under the name of Y. A intended to make the person before him the payee, although he thought the name of the person before him was Y and therefore inserted that name. Accordingly, since X is the real payee, he can transfer a title to that instrument by indorsing it either in his own name or in the name of Y, his assumed name. The same principles would be applicable if an instrument was specially indorsed to X under the name of Y. The problem presented here may be further illustrated by an actual case, Montgomery Garage Co. v. Manufacturers' Liability Insurance Co., 94 New Jersey Law 152. The facts in the case were: On March 15, 1918, one Ennis, representing himself to be N. K. Turner, went to the Manufacturers' Liability Insurance Company and delivered to it a check for $5,000, which turned out to be bogus, and received from the company its check for $1,500, being the check in question. On the same day that check was indorsed and delivered to the plaintiff by the person representing himself to be N. K. Turner. The check was

promptly presented by the plaintiff to the bank for payment, but payment had been stopped overnight by the defendant.

It further appeared that the plaintiff became the holder of the check before it was overdue, and, at the time it was negotiated to it, the plaintiff had no notice of any infirmity in the check, or of any defect in the title of the person negotiating it, and before receiving any such notice the plaintiff gave or paid to the person who negotiated the check, as consideration therefor, $300 in cash, a check for $200, a check for $500, and a negotiable certificate of credit for $500, on the purchase price of an automobile. These checks given by the plaintiff passed into the hands of bona fide holders for value, and were paid by the plaintiff. The negotiable certificate of credit for $500 on the purchase price of an automobile was delivered to the person known as N. K. Turner, and is still outstanding, and is admitted to be assignable by the holder without the consent of the plaintiff, and is treated by the plaintiff as binding on it. It further appeared that at the time of the above transactions both the plaintiff and the defendant believed that Ennis was N. K. Turner, and that Ennis was the person to whom the defendant issued and delivered the check, and who was intended by it to be the payee.

In delivering its opinion, the court said: "A man's name is the verbal designation by which he is known, but the man's visible presence is a surer means of identification. In the case at bar, if the plaintiff, before cashing the check, had sent for and asked the

drawer whether or not the person presenting the check was the person to whom it was intended to be paid, the answer would have been in the affirmative. Of course the drawer was deceived as to the name of the man it was dealing with, but it dealt with, and intended to deal with, the visible man who stood before it, identified by sight and hearing. Thinking this man's name was N. K. Turner, it drew a check to N. K. Turner's order, intending thereby to designate the person standing before it. Clearly, therefore, the plaintiff has simply paid the money to the person to whom the drawer intended it should be paid. Now either the plaintiff or the defendant must suffer the loss. Both were innocent parties, and the loss justly falls upon the defendant whose mistake in issuing the check facilitated the fraud and primarily made such loss possible."

ASSUMED OR BUSINESS NAMES.—A person may even for a single transaction assume a name different from his own, and if the instrument is really intended to be made payable to him or indorsed to him, he has a title which he can transfer either under his temporarily assumed name or under his real name. If one calls himself John Smith and gets a check in that form, it is really payable to him, and he may transfer title to it by any name that designates him. Section 42 of the Act specifically refers to common cases of this sort of thing; that is, where an instrument is made payable to the cashier or fiscal agent of a corporation. There the statute says that prima facie the instrument is to be treated as payable to the corpo-

ration itself, and it may be indorsed either by the officer or by the corporation itself. The statute does not say so, but we presume the same thing would be true the other way around. Suppose a note payable to the bank or fiscal corporation and indorsed in the name of the cashier or fiscal officer, as a check payable to the A bank indorsed "X Y, cashier of the A bank." That indorsement would be good. That is a sort of business designation for the purpose of negotiating paper of the A bank. It is equally true that one who signs negotiable paper under a trade or assumed name incurs the same liability as if he signed his own name. (Section 18.)

INDORSEMENT WHERE NAME IS MISSPELLED.—Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature. The provisions of this section are a necessary consequence of the previous provision allowing a man to sign a negotiable instrument in an assumed name. If he may sign in an assumed name, necessarily he may in a misspelled name. The further addition of his name correctly spelled is for the purpose of avoiding confusion. (Section 43.)

INDORSEMENT IN REPRESENTATIVE CAPACITY.—Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

HOW AN AGENT SHOULD INDORSE.—As we have seen, the signature of "A, agent," imposes personal liability on A. A problem therefore is pre-

sented to an agent when in his principal's business he receives negotiable paper payable to him as agent, and he desires to discount or otherwise negotiate it. If he makes an indorsement as "A, agent," he will subject himself to personal liability. He must, therefore, negative the inference that he means to contract personally. Of course, he can do this by indorsing without recourse, but those with whom he is dealing may demand an indorsement which will be binding as an obligation. In such a case he should indorse so as to bind his principal but not himself. He may do this by signing his name "on behalf of" his principal, naming the latter, or by signing the principal's name "by" himself as agent. Though an indorsement in the latter form does not follow literally the terms on the face of the instrument, and might not be desirable for a bank to accept, it is legally sufficient.

TIME AND PLACE OF INDORSEMENT; PRESUMPTION.—Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue. Except where the contrary appears, every indorsement is presumed prima facie to have been made at the place where the instrument is dated. The place of indorsement may be important in deciding whether or not an indorser is liable. For instance, in a recent case a married woman who indorsed for accommodation a note dated and payable in New York, when sued on her indorsement, sought to show that the indorsement was in fact made in New York and was invalid

under the laws of that State. It was held that this could not be shown against the plaintiff, a holder in due course. As against anybody except a holder in due course, the evidence would have been admissible.

INDORSEMENT BY AN INFANT OR A CORPORATION.—The ability of a party to indorse is ordinarily governed by contract law. There is a special provision, however, in the Negotiable Instruments Law relating to the effect of an indorsement by an infant or by a corporation which provides that: "The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon." There is no question that an infant is not liable upon his indorsement the same as an ordinary indorser. Therefore, if I hold a promissory note with six indorsers, and the maker and five indorsers are worthless and the sixth, who is an infant, repudiates his liability, he may do so. The difficulty arises, however, under the provision of the Negotiable Instruments Law in this way. Suppose my title to the paper depends on the indorsement of an infant. While it is true I cannot hold him as the ordinary indorser, is he at liberty completely to repudiate the indorsement so as to invalidate my title? The Act is not clear on this point, but what little judicial interpretation there is leads us to believe the rule to be that he may disaffirm fully his contract of indorsement. In Murray v. Thompson, 136 Tenn. 118, this question was squarely presented to the court for decision and it was

held that a minor may disaffirm an indorsement made by him. In that case the court said: "One of the questions on which judicial decisions were in conflict was, whether an infant's indorsement of a negotiable instrument was void or only voidable. * * * It was to make certain and uniform the law on this point that Section 22 was embodied in the Negotiable Instruments Act. In stipulating that the indorsement of the instrument by an infant 'passes property therein,' it was meant to provide that the contract of indorsement is not void, and that his indorsee has the right to enforce payment from all parties prior to the infant indorser. The incapacity of the minor cannot be availed of by prior parties. It was not intended to provide that the indorsee should become the owner of the instrument by title indefeasible as against the infant, or to make the act of indorsement an irrevocable one. The Act does not concern the right of such an indorser to disaffirm under the rules of the law of infancy. The words 'passes the property therein,' if given a meaning that would deny that right in respect of a contract of indorsement, would deprive the infant of the right to reinvest in himself the title to the instrument against a holder who had knowledge of the indorser's infancy. The quoted words are not qualified so as to save his rights in such assumed case. It must be admitted that the legislature did not intend any such radical and grossly inequitable departure from a settled and salutary rule of law. * * * The Act having no effect on the right of an infant to disaffirm, the precedents in relation to that right govern.

* * * The common law rule is that the purchaser and indorsee of such a note is not a bona fide holder as against an infant indorser, and that the latter may disaffirm and recover the note from the possession of the former, who takes with constructive notice of the incapacity."

CONTINUATION OF NEGOTIABLE CHARACTER.—An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise. Under Section 47 a negotiable instrument continues to be negotiable after maturity as well as before, although as appears from other sections of the Act, the rights and obligations of the parties are different after maturity from what they are before.

STRIKING OUT AN INDORSEMENT.—The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument. The rule enacted in Section 48 is most commonly applied in a case in which a person who indorsed a negotiable instrument, which has thereafter been in other hands and indorsed by others, takes it up and desires to get payment from prior parties to the instrument. If he were obliged to trace his present title fully, he would have to prove every indorsement subsequent as well as prior to his own; but as the subsequent indorsements are of no interest to him, since he cannot exact payment from a party to the instrument who is subsequent to himself, he

may strike out the subsequent indorsements and establish a chain of title merely to his first holding of the instrument. By operation of law he is remitted to the same position which he originally occupied. Or we may suppose that before the instrument ever came into his hands there were several indorsements upon it, the first of which was a blank indorsement. On taking up the instrument he may write over the blank indorsement a special indorsement to himself, and strike out all later indorsements. In this case, however, he is releasing from liability indorsers whom he might have charged since their names were on the instrument before he became a holder. Therefore he will not adopt the course suggested unless he is sure to get reimbursement from parties to the instrument prior to those whose names are struck out.

EFFECT OF TRANSFER WITHOUT INDORSEMENT.—Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

ILLUSTRATIONS OF CASES OF TRANSFER.—Negotiable paper can be negotiated only in accordance with the custom of merchants; that is, if payable to order it must be properly indorsed; but all contract rights for the payment of money may be as-

signed and therefore one who transfers order paper without indorsement is the assignor of a chose in action. The transferee is an assignee, and, as we have said, his rights differ from those of an indorsee only in this—that he takes subject to personal defences or equities in favor of the maker and other parties bound by the instrument. It may be added that the same results which this section enacts for the transfer of the paper would follow if the holder of the paper without transferring it merely agreed for value to do so; with this exception, however, the assignee could not demand payment from the parties bound on the instrument until he secured it and was able to surrender or cancel it. He would, however, have the right to demand the instrument from the holder who had agreed to assign it to him. Until he actually got possession of the paper, his right would always be subject to be cut off by an indorsement by the assignor to a holder in due course. One may suppose also a transfer with delivery but without indorsement and without value. Such a transfer would operate as a valid gift irrevocable by the transferor, but the donee, not being a holder in due course, would be subject to any defences which were available against his donor.

ILLUSTRATION OF TRANSFER WITHOUT INDORSEMENT.—Suppose A has a negotiable instrument payable to his order. He transfers it to X on February 2nd and all the elements are present to constitute X a holder in due course except that A did not indorse it to X. On February 4th, X hears from a reliable source that the note he had taken

from A was procured by A fraudulently. A few days later X meets A, reminds him that he failed to indorse the note when he transferred it to him and asks him to do so now, which he does. When the note is due, it is not paid and X sues on the theory that he is a holder in due course. May he recover as such? Manifestly not, for he had knowledge of the fraud tainting the note on the day A indorsed it to him, and although the actual transfer was made to him before that date, the Negotiable Instruments Law plainly states that the negotiation takes effect as of the time when the indorsement is actually made.

WHEN PRIOR PARTY MAY NEGOTIATE INSTRUMENT.—Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this Act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable. If a party primarily liable becomes a holder of the instrument at or after maturity, it is discharged and cannot be reissued. It does not extinguish an instrument, however, for anybody except a party primarily liable to become the holder even though he does so after maturity. The final sentence of Section 50 expresses a result that has been established in order to avoid what is called circuity of action; circuity of action indicates that a plaintiff is allowed to recover money from a defendant who can thereafter recover it back from him. If A were the second indorser of an instrument, and after two subsequent indorsements again became the holder

of the instrument, and if he were allowed to sue the fourth or the third indorser on dishonor of the instrument by the maker, the fourth or third indorser on being compelled to pay, could recover from him as second indorser. To avoid this round-about result, the law denies a recovery by the holder against the third and fourth indorsers in the case supposed.

TRANSFER BY DELIVERY.—Where the document is payable to bearer, transfer may be made by delivery as effectively as by indorsement. But is the effect the same? We have discussed fully in this chapter the qualified indorsement, and the Negotiable Instruments Law puts the two types of negotiation on the same footing. Turn to Section 65 and you will find it begins: "Every person negotiating an instrument by delivery or by qualified indorsement, warrants, etc." One difference only is provided by this section. Suppose a transfer is made by A to B of a bearer document, A not indorsing. B then tranfers to C without indorsing. C has to sue to collect and the only transferor of the paper who is financially good is A and the maker is an infant who repudiates his liability. May C sue A on his warranty that "all prior parties had capacity to contract" as he could do if A had indorsed "without recourse"? He cannot, for this is the one case where transfer without indorsement differs from the qualified indorsement. Turn to Section 65 again and you will find that it reads: "When the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee." C is B's immediate transferee, not A's.

CHAPTER V

Delivery

DELIVERY IS ESSENTIAL TO THE VALIDITY OF A NEGOTIABLE INSTRUMENT.—In addition to the intentional signing of the instrument, something further is necessary in order to give a bill or note legal effect. A bill of exchange or a promissory note is not operative as against the drawer or the maker until its delivery. By delivery, we mean the transfer of possession with intent to transfer title. Delivery, therefore, means more than the mere handing over of the paper to another. It imports such a transfer of the document as to enable another to hold it for himself. Thus, if the maker or the drawer has put the paper into the hands of his agent or a custodian merely to hold, it has not been delivered any more than if he had put it into his safe for safekeeping. It is also true that theft from the agent would be no different from theft from the drawer's or maker's safe.

QUESTION OF DELIVERY.—The problem surrounding the question of delivery has well been summed up by the Supreme Court of Washington in the case of Angus v. Downs, 85 Washington 75, which reads: "As a general rule, a negotiable promissory note, like any other written contract, has no legal inception or valid existence, as such, until it has been delivered in accordance with the purpose and intent of the parties. There accordingly is no doubt

that delivery of a negotiable instrument is necessary to create any liability as between the immediate parties. But the authorities have long been in violent conflict as to whether a bona fide holder can recover on an instrument which has never been delivered by the maker or drawer to any one for any purpose. Some courts have held that delivery is not essential to the validity of an instrument in the hands of a due course holder. And this rule has been declared to be applicable in case the instrument has been taken from the maker's possession by theft. On the other hand, many courts have taken the view that an innocent holder for value of paper commercial and negotiable in form, but which has never been completed by delivery, cannot acquire rights thereto against the alleged maker. And it has been held that a negotiable security, stolen from the maker before it has become effective as an obligation by actual or constructive delivery, may not be enforced by any subsequent innocent holder. These courts have reasoned that the wrongful act of a thief or a trespasser may deprive the holder of his property in a note which has once become a note, or property, by delivery, and may transfer the title to an innocent purchaser for value, but that a note in the hands of the maker before delivery is not property, nor the subject of ownership, as such; it is, in law, but a blank piece of paper. Sound reason would seem to require the question to be resolved with a view to the facts of the particular case and the principles of negligence." We must now consider the problem in the

light of the provisions of the Negotiable Instruments Law and of the decisions under it. We find by referring to Sections 15 and 16 of the Act that there are two types of negotiable instruments to be considered: the incomplete instrument and the complete instrument.

THE PROVISIONS OF THE NEGOTIABLE INSTRUMENTS LAW AS TO DELIVERY.—Before taking up this discussion, it is important to have before us the exact wording of these two sections. Section 15 reads: "Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery." Section 16 reads: "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a

party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved."

DIFFERENT KINDS OF DELIVERY.—In considering the various kinds of delivery, we shall deal first with the case of a completed instrument. During this discussion we must further keep in mind the rights of two parties, the holder in due course and a person not a holder in due course. The discussion of the rights of the holder in due course on page 95 should be referred to and the following illustrations kept in mind: A executes his promissory note for one hundred dollars and gives it to B without consideration. A and B are immediate parties, and further, B is not a holder in due course. B, after receiving the note, transfers it to C for value. C is a remote party, and he is a holder in due course if he has taken the note under the following conditions, which are specified in Section 52 of the Negotiable Instruments Act, namely:

1. That it is complete and regular upon its face;
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;
3. That he took it in good faith and for value;
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

As we discuss delivery we shall see that the law differs greatly when we are dealing with a holder in due course and one who is not such.

DEFINITIONS.—Delivery is of four kinds: by intention, by agency, by negligence, and by operation of law.

1. Delivery by intention may be spoken of as actual delivery, and in some jurisdictions even delivery by mistake is held intentional, because a thing done by mistake is done intentionally; however, in other jurisdictions it is held that there can be no valid delivery where delivery is obtained by mistake. The consequence may not be in the mind of the party and so not what he intended, but the act itself was intentional.

2. Delivery by agency is or may not be delivery which the drawer or maker intended, as the agent may deliver directly contrary to his instructions, but it is nevertheless a delivery.

3. Delivery by negligence in order to make it a case of delivery is governed by the manner in which the instrument passes into circulation.

4. Delivery by operation of law. Such delivery is one not included in the three previous headings and is still just as much a delivery, legally, because of the wording of Section 16: "where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed."

LEGAL EFFECT.—Delivery by intention is, of course, always valid. Delivery by agency is valid, even if beyond the agent's authority, and the document is in the hands of a holder in due course. Delivery by negligence, as Bigelow says, "imports that the

instrument has passed into circulation without intention or agency, by the defendant's failure to exercise reasonable care in keeping it in his hands, as, for instance, in a den of thieves or gamblers or in a brothel." Delivery by operation of law, being provided by the Negotiable Instruments Law, is, of course, always valid.

THE EFFECT OF DIFFERENT KINDS OF DELIVERY ILLUSTRATED.—We shall now consider the effect of these various kinds of delivery as illustrated by cases and the Negotiable Instruments Law. Suppose after A's death a promissory note made by him payable to the order of Smith is found among his papers. Such a document imposes no obligation on either the maker or his estate. There was no delivery by the maker and no one would have authority to make delivery for him after his death. One of the leading cases is Baxendale v. Bennett, 3 Q.B.D. 525. The facts in this case were: The defendant signed a blank acceptance and gave it to a person who wanted money, that he might get it discounted; that person sent the blank acceptance back to the defendant, who put it into a drawer in his room; the room was not a place of general resort, and the drawer into which the acceptance was put was left unlocked. Somebody, not a servant of the defendant, stole it, and it was filled up by a different person from him to whom the acceptance was originally given and who had returned it. The court held that the defendant never authorized the bill to be filled in with a drawer's name, and he was not liable on the bill. The court

said: "I do not think it right to say the defendant was negligent. The law as to the liability of a person who accepts a bill in blank, is that he gives an apparent authority to the person to whom he issues it to fill it up to the amount that the stamp will cover; he does not strictly authorize him, but enables him to fill it up to a greater amount than was intended. Where a man has signed a blank acceptance, and has issued it, and has authorized the holder to fill it up, he is liable on the bill, whatever the amount may be, though he has given secret instructions to the holder as to the amount for which he shall fill it up; he has enabled his agent to deceive an innocent party, and he is liable. Sometimes it is said that the acceptor of such a bill is liable because bills of exchange are negotiable instruments, current in like manner as if they were gold or bank notes; but whether the acceptor of a blank bill is liable on it depends upon his having issued the acceptance intending it to be used. No case has been decided where the acceptor has been held liable if the instrument has not been delivered by the acceptor to another person. In this case, it is true that the defendant, after writing his name across the stamped paper, sent it to another person to be used. When he sent it to that person, if he had filled it in to any amount that the stamp would cover, the defendant would be liable, because he sent it with the intention that it should be acted upon; but it was sent back to the defendant, and he was then in the same condition as if he had never issued the acceptance. The case is this: the defendant accepts a bill and puts it into his drawer; it is as if he had never

issued it with the intention that it should be filled up; it is as if after having accepted the bill he had left it in his room for a moment and a thief came in and stole it. He has never intended that the bill should be filled up by anybody and no person was his agent to fill it up." There was a similar holding recently in the case of Holzman, Cohen & Co. v. Teage 158 N. Y. Supp. 211.

THE CASE OF COMPLETED CHECKS STOLEN FROM THE DRAWER.—Suppose a person fills out a number of checks in full, making them payable to bearer, and locks them in the safe in his office. The safe is broken into and the checks are stolen and delivered by the thief to a holder in due course. He may collect the checks. This may seem strange, as it would appear that the drawer of these checks was more careful than the drawer of the bill of exchange in Baxendale v. Bennett. The distinction lies here: in Baxendale v. Bennett the instrument was not completed by the drawer; it was completed by the man who stole it. Refer to Section 15 of the Negotiable Instruments Law and you will note it reads: "Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery." In the second case where the drawer of the checks placed them in his safe, they were completed documents and reference must be made to Section 16, which covers such a case. This section reads: "Every contract on a negotiable instrument is incomplete and revocable until delivery

of the instrument for the purpose of giving effect thereto." It is plain that there was no delivery of the checks by intention or by agency or by negligence. There was, however, what we call delivery by operation of law, covered by the latter part of Section 16 of the Negotiable Instruments Law. The last sentence but one of that section reads: "But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed."

THE THEFT AND DELIVERY OF A COMPLETED NEGOTIABLE INSTRUMENT.—One more illustration from a recent New York case will make this point clear. We quote from the opinion of Pendleton J., in Schaeffer v. Marsh 153 N. Y. Supp. 96: "The action was brought by the holder for value without notice of a certain check drawn by the maker to one Marsh, indorsed by the latter and negotiated with plaintiff. It appears by the evidence that after the making out of the check and its signature by defendant, and before delivery, it was stolen from him, and thereafter indorsed and negotiated by the payee. The court rendered judgment for defendants, and the question involved on this appeal is whether the above facts constitute a defense to this action. When stolen from the maker, the check was in all respects completed, except as to delivery. There is no evidence of any negligence on defendant's part which would estop him from alleging that the check never had any valid inception by delivery, and the question is therefore

squarely presented as to whether, under the Negotiable Instruments Law, the above facts are a defense to the check in the hands of a bona fide holder for value. In Poess v. Twelfth Ward Bank, 43 Misc. Rep. 45, 86, N.Y. Supp. 857, it was held that a check drawn by a maker, certified by the bank, and indorsed by the maker in blank, stolen from the maker before delivery, was nevertheless valid in the hands of a bona fide holder. So in Greeser v. Sugarman, 37 Misc. Rep. 799, 76 N.Y. Supp. 922, a note made to the maker's order and indorsed, and afterwards stolen from him, was valid in the hands of a bona fide holder for value, under section 35 of the Negotiable Instruments Law. In Linick v. Nutting, 140 App. Div. 265, 125 N.Y. Supp. 93, decided in 1910, a blank check, stolen from the maker and afterwards filled in and negotiated, was held invalid in the hands of a holder for value without notice; that until completion and delivery it had no inception, and the maker could not be held liable, unless for such negligence as would estop him from setting up the non-delivery by him. While the reasoning of the opinion and the case cited with approval (Burson v. Huntington, 21 Mich. 415, 4 Am. Rep. 497), tended to the view that the same rule would apply to an instrument complete in form stolen from the maker before delivery; the decision itself was put on the ground that under Section 34 of the Negotiable Instruments Law an incomplete instrument, which has not been delivered, is not a valid contract in the hands of any holder, and that Section 35 must be read in connection with Section 34, and, so read,

its provisions as to the conclusive presumption of delivery do not apply in the case of an incomplete instrument, such as the one under consideration. The fair result of these cases is that, where the instrument is complete, except as to delivery, the non-delivery is not a defense as against a bona fide holder in due course for value."

MISAPPROPRIATION OF MUNICIPAL SECURITIES.—Another striking application of the rule is found in the recent New Jersey case of Borough of Montvale v. Peoples Bank, 74 N. J. Law 464. In this case an action was brought by the Borough of Montvale to recover from the possession of the Peoples Bank certain coupon bonds, dated July 1, 1903, payable to bearer on the 1st day of July, 1913, and made and executed by the borough, but which it avers were never issued or delivered by it. The court said: "The case was tried in the court below upon an agreed state of facts, from which it appeared that the bonds in suit were two of an issue of thirty $500 bonds, each of which was signed by the mayor of the borough, one Alfred M. Crotty, sealed with the corporate seal of the municipality and duly attested by the borough clerk; that some of the bonds were sold by the borough, and the remainder were left by it in the custody of the mayor until some further disposition of them should be made by the borough; that the bonds in suit are two of those which were left in the custody of the mayor; that while in this custody, the latter hypothecated them with the defendant bank to secure the payment of a loan made by it to him; that the bank

had no knowledge until long after the making of the loan and the pledging of the bonds that Crotty was not in lawful possession of them and authorized to sell and dispose of them."

The decision of the court reads: "It is suggested that, although the bank had no knowledge of any lack of authority on the part of Crotty to dispose of the bonds, the fact that he signed them as mayor charged it with notice of the defect in his title within the meaning of the fifty-second section of the statute. But it is provided by the fifty-sixth section of the Act that 'to constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.' Knowledge on the part of the bank that the person to whom they made the loan was the mayor of the borough, if it had such knowledge, affords no ground for holding that its action in taking the bonds amounted to bad faith. Notwithstanding that Crotty executed them in his official capacity, he had as complete a right as any other citizen of the borough or any member of the public at large to become a purchaser of its securities, and the fact that he assumed to deal with them as his own in his transaction with the bank, instead of being notice to it that he was betraying the trust reposed in him by the municipality and was fraudulently putting upon the market securities which had not been issued by it, justi-

fied the bank in believing that he was in fact just what he represented himself to be by his conduct, namely, the owner of the securities. The bank is therefore the holder in due course of the bonds in suit, as such holder is defined by the statute."

CHAPTER VI

Real and Personal Defences

REAL AND PERSONAL DEFENCES.—We shall now consider one of the most important topics in the law of negotiable paper. The defences which may be interposed by a party to a bill or note where suit is brought by the holder against him are commonly of two classes—absolute or real, and personal. In no branch of our subject do the peculiar principles of negotiability show to better advantage. We have already discussed in the introductory chapter the principle involving the distinction between the real or absolute, and the personal defence. We found that the real defences are those which attach to the instrument itself, while personal defences are those which grow out of the conduct of a particular person which renders it impossible for him to recover on the instrument, although the holder in due course can recover on the same paper. We shall take up these defences separately.

FRAUD AS AN ABSOLUTE DEFENCE.—Generally fraud is only a personal or equitable defence, but in certain instances it may be an absolute or real defence. Such a case is one in which the maker of the instrument did not know and had no reasonable cause to know that he was making a negotiable instrument at all. If a man knows he is making such an instrument, even though he is induced to make it by fraud, it is his instrument and he is bound

by it. But suppose by clever sleight of hand a fraudulent person gets another to sign a note who is under the belief that he is signing a receipt or letter of introduction or something of that sort. Here you will notice that the signer has never assented to make a negotiable instrument. It is not a case where he is induced to assent by false representations. In that case he assents to do the thing but in this case he never assented to sign a negotiable instrument at all; and therefore he may assert that it is not his note, unless he was guilty of such negligence as precludes him from subsequently asserting the truth that it was not his instrument.

LACK OF TITLE.—A second absolute defence is lack of title in the holder of an order instrument. Lack of title in an instrument, payable to bearer, as we have said, does not prevent the holder from giving a good title, but lack of title in an instrument payable to order does. Even though it be conceded that the maker of a note or drawer of a check be liable, he has a right to pay the real owner of the instrument. If he should pay any one who did not have title, the payment would not be a discharge of the instrument, and he would have to pay over again. Therefore, he has a defence against anybody who has not title. Consequently, a holder, to recover on an order instrument, must make out not only the defendant's liability on the instrument to some one, but also his own title to it.

A HOLDER'S BANKRUPTCY DEPRIVES HIM OF TITLE.—Another case of lack of title is

where the holder of negotiable paper has become bankrupt. The National Bankruptcy Law vests in the trustee all the property which the bankrupt had at the time of his bankruptcy. We suppose that statute vests an absolute title even to negotiable paper, so that one who innocently bought negotiable order paper from a bankrupt, to whom it was payable, after his bankruptcy would not be protected. The trustee in bankruptcy would have become the owner of it and the bankrupt himself would have no better right to it than if he held under a forged indorsement. If, however, the instrument was payable to bearer, under the general rule applicable to such paper, the bankrupt holder, though having no title himself, could transfer a good title to a holder in due course.

INCAPACITY; INFANCY.—Another absolute defence to a negotiable instrument good against any holder is the incapacity of a party. The instrument may be binding as to some parties, but on account of incapacity others may not be liable. The commonest kind of incapacity is infancy, that is, minority of a party. It is a good defence even against a holder in due course that the party sued is a minor. It is not a good defence that a prior holder was a minor when he indorsed the instrument. Though the minor may avoid that transfer as against the transferee, until and unless he does so, it is a good transfer, and the maker will be bound to pay the transferee. (Section 22.)

LUNACY.—Somewhat similar to infancy is the case of lunacy. It is possible that in some cases of

lunacy the transaction may be absolutely void and incapable of ratification; but whether this is so or not, lunacy is generally held a good ground for treating the obligation of an insane person on the instrument as voidable, even when it is in the hands of a holder in due course.

HUSBAND AND WIFE.—Formerly a married woman could make no valid contract by negotiable instrument or otherwise. This complete disability is now generally done away with, but it is still true, in most States, that a husband and wife cannot make a valid contract with one another, and therefore neither of them can make a valid obligation from one to the other on a negotiable instrument. In a State where a contract cannot be made between husband and wife, a note by a husband to wife or wife to husband is, therefore, worthless, even in the hands of a holder in due course. Whether an indorsement from one to the other will be a valid transfer and will create an obligation depends upon the character of the local statute. In some jurisdictions, by force of such statute, notes between husband and wife are valid, if based on a sufficient consideration, while in other States it is held that the common law rule has not been changed. A check from one to the other deserves a moment's attention. Such a check does not create any obligation between the drawer and payee, but it is a valid order to the bank by the drawer to pay the payee. Accordingly, if the bank does so, the payment is good. In some States married women are under the further disability that they cannot be-

come sureties for their husbands. In such States, therefore, there would be an absolute defence to any suit against a married woman which is based on an obligation which she signed as surety for her husband.

ILLEGALITY.—A fifth absolute defence is raised by certain kinds of illegality. Some transactions are so illegal that even in the hands of a holder in due course a negotiable instrument given in pursuance of them will not be valid. Under the statutes of some States, usury is a defence of that sort. In other States, there is no general usury law.

SUNDAY LAWS.—The Sunday law of many States is rather troublesome at times. One must remember in connection with this matter that it is the delivery of a negotiable instrument, not the date which it bears on its face, which fixes the time when it takes effect. Accordingly, a note dated on Sunday but delivered on Monday is good. On the other hand, a note dated on Saturday or Monday but actually delivered on Sunday is bad, though a subsequent holder, who took such a note in ignorance of the day when it was delivered, might rely on the form of the instrument—that is, on the fact that it was dated on Saturday or Monday—and be protected. The maker would be estopped to deny that it was delivered on Saturday or Monday since the date may properly be assumed to be the true date. (Section 11.) A note, however, which was dated on Sunday, and which was delivered as a matter of fact also on Sunday, would seem to be bad in the hands of any holder, for any holder has

notice by the date, of the time of probable delivery, and therefore ought to be on the lookout for that point.

ILLEGALITY AS A PERSONAL DEFENCE.—One who is not a holder in due course is subject not only to the absolute defences already considered, but also to what are called personal or equitable defences, and these may now be considered. Some, but not all of them, are briefly summarized in Section 55. First, illegality: As we have previously said, illegality may sometimes be an absolute defence good against everybody, but it is more commonly a personal defence good only against the original party to the illegality and those subsequent holders who are not holders in due course. Some of the commonest kinds of illegality are wagering, including under this designation such stock gambling or gambling in securities, as is prohibited by law. Usury is, in most States, where there are usury laws, a personal defence. The sale of goods contrary to law may give rise to a personal defence to a note given for the price. Instruments given as bribes to any person subject to a public or private duty to induce him to disregard that duty would also be another illustration. It would make no difference whether the official bribed were a public officer, a corporation official, a trustee, an employee of a firm, or an individual. So any transaction which involved a breach of fiduciary duty or official duty, whatever its nature, would be illegal, and a negotiable instrument which formed part of the transaction would be subject to a personal defence.

FRAUD.—A second personal defence, and perhaps the commonest, is fraud. As already stated, fraud may be an absolute defence. If the fraud prevented a party to the instrument from knowing that he was signing a negotiable instrument, he would have an absolute defence, unless he was grossly negligent. On the other hand, if he knew that he was signing a negotiable instrument, but was induced to do so by false representations, the defence would be merely personal. Suppose a note was a perfectly good note as between the maker and payee, but was obtained from the payee by fraud, the indorsement of the payee being obtained by fraudulent representation. Payment is then demanded by the fraudulent indorsee. The instrument would be technically discharged by such a payment; but if the maker knows of the fraud he would make himself a party to it if he should pay the fraudulent indorsee, and would be liable to pay again to the defrauded payee. This sort of case may put a bank in rather a hard place. Suppose a check drawn on a bank is presented by an indorsee and the bank believes and is informed by the payee that that check was obtained by fraud. If in fact it was obtained by fraud and the bank refused to pay, its defence would be good against any assertion or complaint by the drawer of the check that his check had been dishonored; but suppose there was, as it turned out, no fraud, then if the bank had refused payment of the check, even temporarily, it would run a risk of subjecting itself to a suit for damage by its customer, the drawer. Nevertheless, there is nothing

that can be done except to refuse temporarily and file a bill for interpleader against the payee and the indorsee, asking the court to render a decision as to which of the two parties is entitled to the instrument.

DURESS.—A defence somewhat similar to fraud is what is known in law as duress. This was at first confined by law to cases where a person was compelled to sign an instrument under imminent fear of bodily harm or imprisonment, but the defence has now been extended beyond that. There are many kinds of duress which do not threaten the person under duress himself with immediate harm. For instance, a case arose in New Jersey which presented these facts: a husband threatened to blow his brains out if his wife did not sign an instrument, and brandished a pistol so that his threat seemed at least plausible, and thereby induced his wife to sign a paper. She would have a personal defence against an obligation entered into in that way. So a threat to injure a child or to injure another person may have even more effect than a threat to injure the person himself whose signature is demanded. The test today is, was such pressure put upon the signer as to prevent him from being really a free agent in the matter? It is not duress, however, to threaten to enforce one's legal rights unless an instrument is signed. For instance, a threat by a creditor to sue, or a threat to attach the debtor's property unless the debtor signed a note, would not be such duress as to create even a personal defence.

LACK OF DELIVERY.—Lack of delivery is a personal defence. Until the passage of the Negotiable Instruments Law it was an absolute defence, but now, by virtue of Section 16, it is only a personal defence. Suppose you make a note payable to bearer and put it in your safe, intending to deliver it the next day. It is stolen and transferred before maturity to a purchaser for value without notice. He can hold you liable upon it, although you never delivered the instrument, and perhaps wrote it as a mere writing exercise. And similarly (a case that is more likely to happen) if you have a note payable to yourself, indorse it without delivering it, put it in your safe, and, as before, it is stolen. A purchaser for value from the thief not only becomes the owner of the note, able to enforce it against the maker, but he can hold you liable on your indorsement as an indorser. Lack of delivery is therefore not an absolute defence. It is, however, a personal defence good against the original payee and any one with notice that the instrument was not delivered or was delivered only for a special purpose which has not happened. For instance, if you deliver a note to a note broker to dispose of, and he does not dispose of it in accordance with the authority you gave him, you have a personal defence against him if he tries to collect it, or against any one who knew of the circumstances, because of the original understanding that the instrument should be delivered as a binding obligation only on certain terms.

LACK OF CONSIDERATION.—Another per-

sonal defence is lack of consideration. We have already referred to that subject, on page ninety, in connection with the liabilities of different parties on negotiable instruments, and it is not necessary to repeat what has been said before. It is enough to say here that if there is not the consideration or value which the law requires for the obligation of any party to an instrument, he has a defence as against anybody but a holder in due course, because of this lack of consideration or value. The commonest kind of signature without consideration is that of an accommodation party. An accommodation party, therefore, even though the maker of the instrument, cannot be sued by the holder if the holder was the accommodated party. There is one peculiarity, however, about the defence of accommodation which distinguishes it from all other personal defences. An accommodation party has no defence merely because the holder took the instrument from the accommodated party with knowledge that it was given for accommodation. (Section 29.) Generally, as we have seen, one who takes with a notice of a personal defence from one who was subject to that defence, becomes himself subject to the defence in the same way as the man from whom he took it. One who takes from a fraudulent payee knowing of the fraud can no more collect than the fraudulent payee, but one who takes from an accommodated payee knowing of the accommodation can, if he gives value, collect from the accommodation maker. And the reason for this distinction is plain: the accommodating party lent

his signature for the very purpose of having it negotiated, and therefore it would be highly improper not to allow one who has relied on the signature to recover upon it, even though he knew perfectly well that it was for accommodation. In buying the instrument or lending money on it, he is doing exactly what the accommodating party expected him to do.

FAILURE OF CONSIDERATION.—A defence somewhat similar to lack of consideration and yet a different one is what is called failure of consideration. This arises where an instrument is given for some prospective or promised return which is not given. For instance, suppose a note is given in return for a promise to deliver goods later. There is no lack of consideration, strictly speaking, for this note, because there was a promise to deliver the goods, and a promise is sufficient consideration for the note. But if the goods are not delivered when the time comes there is failure of consideration; the thing expected was not given; the promise has not been kept. And thus where there is failure of consideration the person who was to give the consideration cannot recover because he has failed to give it, and any holder who took the note, knowing that the consideration had failed, will similarly be unable to recover. Perhaps as common an illustration of this defence as any, arises where a note is given for the price of a chattel which is warranted and there is a breach of the warranty. In many States, that entitles the buyer of the chattel to rescind the contract, to give back what he has bought, and to demand his discharge from the

obligation of the note. Accordingly, if he tenders back the inferior chattel he has a defence against any action on the note brought either by the payee, who sold the chattel and warranted it, or by anybody taking from that payee who is not a holder in due course.

DISCHARGE BEFORE MATURITY.—Still another personal defence is discharge of an instrument before maturity in any way except by the cancellation of it. We have already seen that cancellation of a negotiable instrument, even before maturity, is an absolute discharge of it. Any kind of discharge by payment, release, or accord and satisfaction is a good defence after maturity, because after maturity there can no longer be a holder in due course. Every one who takes after maturity will take subject to that defence of payment or release or accord and satisfaction. But payment, or release, or accord and satisfaction of a negotiable instrument before maturity is only a personal defence. You may have a holder in due course after the payment or release, and this holder in due course can sue again on the instrument and recover in spite of the fact that the maker has already paid once. The moral, of course, is plain, that if an attempt is made to settle a negotiable instrument before it is due, it must be accompanied by a cancellation of the instrument; that is, some physical mutilation or destruction of the paper sufficient to show that it is no longer a valid obligation.

ALTERATION.—Another personal defence is alteration, of which we have already spoken in connection with absolute or real defences. The maker of an

altered note has an absolute defence against the note in its altered form, but has a personal defence only against it in its original form, that is, a holder in due course can enforce the note according to its original tenor. Nobody can enforce it according to its altered tenor.

SET-OFF AS A PERSONAL DEFENCE.—Another personal defence may arise from a right of set-off. Suppose the maker of a note has on another account a claim against the payee which the maker of the note could set off against the claim of the payee if the payee should sue on the note. Now suppose the payee indorses the note. Can the maker use this right of set-off against the indorsee who has purchased the note, or must the maker pay the note in full to the holder and then try to collect his own claim from the original payee? It is held generally in this country, to depend upon whether the indorsee was a holder in due course. If he is, he takes free of the right of set-off. If, however, he did not give value, or if he knew of the claim in set-off, or purchased after maturity, generally in this country the maker of the note may assert his right of set-off against the indorsee. In England he cannot do that. It is said there, that the right of set-off is not really an equity relating to the note, and that it is a separate claim good only against the original payee, which should not travel with the note and should not under any circumstances be good against anybody but the payee of the note.

PAROL EVIDENCE RULE.—This concludes the list of personal defences with the exception of one

thing, which partakes somewhat of the nature of a personal defence, although it is a more extensive matter than a mere personal defence. This is what is called the Parol Evidence Rule. The Parol Evidence Rule in substance is this: when any party enters into a written contract the terms of the contract must be determined wholly from the writing. This rule does not apply simply to bills and notes, it applies to any written contract, and it forbids parties to written contracts attempting to prove that the writing is not really what they agreed, or that they agreed to something more or something less than the writing. Nothing is commoner than for parties to attempt that sort of wriggling out of a written contract. The party to the writing who finds his feet pinched by some of its provisions frequently in good faith thinks it was not what the parties originally meant. The Parol Evidence Rule requires the court to enforce the writing, and not what the parties testify they meant or would have written if they had thought about it, or anything of that sort. Not infrequently the Parol Evidence Rule works a certain injustice, because it may be true that the writing did not contain all that the parties agreed, or contains something a little different from what they bargained for. But the defence of the rule is that it makes more certain the real agreement between the parties in so many more cases than those in which it works injustice, that on the whole it works well.

ILLUSTRATIONS OF INADMISSIBLE PAROL EVIDENCE.—Now how does the Parol Evidence Rule hit negotiable instruments? Not in-

frequently a party to an instrument will attempt to set up some agreement which he asserts he made in regard to the note. A common agreement of this sort is an agreement that the note need not be paid at maturity but may be extended. That sort of agreement if made contemporaneously with the note cannot be proved. The note by its terms says it is payable on such a day. It would contradict the terms of that writing to set up and prove an agreement that it was not to be paid then, but that it was to be paid at some later day. So if a note is positive in terms it would not be permissible to show that it was agreed between the parties that the note should be paid only upon a certain contingency. That sort of agreement is frequently made, but it is invalid unless made part of the writing.

SUBSEQUENT ORAL AGREEMENTS ARE VALID.—We must call attention, however, to the fact that the Parol Evidence Rule relates only to agreements made at or before the time when the writing was executed. One may make a subsequent oral agreement which, if it has sufficient consideration, will not infringe upon the Parol Evidence Rule and will be binding. The reason for this distinction between subsequent agreements and agreements made at or before the time of the writing is this: the theory of the Parol Evidence Rule is that when parties reduce their agreement to writing, prima facie they include in that writing everything relating to that matter. But the next day or the next week they may change their minds, and they have a right to make a new agree-

ment. There is nothing in the fact that they made a writing yesterday which would lead any one to suppose that that writing was going to be good permanently; but it is fair to suppose that at the time they made it, it expressed their whole intention in regard to the matter. Consequently, these contemporaneous agreements which we have suggested, relating to the same subject-matter as the note and inconsistent with its terms, cannot be shown, but let us now consider some cases involving matters which may seem to come within the Parol Evidence Rule, but which, nevertheless, do not contravene that rule, and may be shown.

ILLUSTRATIONS OF WHAT MAY BE PROVED.—It may be shown that indorsers are not liable in the order in which their names appear on the paper. It is not regarded as a contradiction of the instrument to show that the first indorser really wrote his name low down on the back of the paper and the second indorser wrote his higher up. Neither is it an infringement of the Parol Evidence Rule to show that one of the signers signed for the accommodation of another; that does not affect the liability of the accommodating party to the holder of the note. If he is a maker he is liable as a maker, even though he makes the instrument for accommodation. The fact that the instrument was never delivered as a negotiable instrument may be shown. It may be shown that the date which the instrument bears on its face, though such a date is prima facie proof of the date when the instrument was delivered, was not really the

date of delivery. It may be shown that the instrument when delivered was either antedated or postdated. If the language is ambiguous also the law allows evidence of the surrounding circumstances and other matters tending to show what the ambiguous words really meant. In any kind of contract the Parol Evidence Rule does not prevent a party from showing that the instrument took its present form because of fraud or duress, and certain cases of gross mistake also may be shown, and the enforcement of the contract relieved against. It has sometimes been thought inconsistent with the principle of the Parol Evidence Rule that an acceptance of a bill of exchange should not be required to be written on the face of the instrument. It is the custom of merchants, of course, when a bill is accepted to write it on the bill, but an acceptance may legally not only be written in that way but may also be written on a paper other than the bill itself. That is so provided in Section 151. But such an acceptance only binds the acceptor in favor of a person to whom it is shown and who on the faith thereof receives the bill for value. To go just a little further, we find that, even before a bill is drawn an unconditional promise in writing to accept the bill is deemed an acceptance in favor of any one who on the faith of the writing receives the bill for value.

RELATION OF PAROL EVIDENCE RULE TO PERSONAL DEFENCES.—Now how does the Parol Evidence Rule have anything to do with personal defences and holders in due course? Only in

this way: a purchaser who is a holder in due course unquestionably will have a right to rely on the terms of the instrument as they appear in the writing. Whether a collateral agreement does or does not infringe upon the Parol Evidence Rule, it is important to determine whether it may be shown as between the original parties to the instrument; but in either case it cannot be shown as against a holder in due course if the terms of the instrument do not indicate the defence.

WHAT CONSTITUTES NOTICE OF DEFECT.—There was formerly considerable litigation upon the question whether one who took an instrument for value and in good faith, but negligently, was a holder in due course. In other words—is it the equivalent of actual notice of a defence to prove that if the holder had not been negligent he would have learned of the defence in question? The statute establishes that negligence is not the equivalent of notice. Knowledge of such facts is necessary, as would indicate actual bad faith. The law is thus laid down in the Act (Section 56): "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." As was said by the United States Supreme Court in Goodman v. Simonds, 20 How. 343: "Every one must conduct himself honestly in respect to the antecedent parties, when he takes negotiable paper,

in order to acquire a title which will shield him against prior equities. While he is not obliged to make inquiries, he must not wilfully shut his eyes to the means of knowledge which he knows are at hand, as was plainly intimated by Baron Parke in May v. Chapman, 16 Mees. and W. 355, for the reason that such conduct, whether equivalent to notice or not, would be plenary evidence of bad faith. Mere want of care and caution, which was the criterion assumed in the instruction, falls so far below the true standard required by law, which is knowledge of the facts and circumstances that impeach the title, that we feel indisposed to pursue the general discussion, and proceed to confirm the views we have advanced as to what the law is by referring to some of the decisions in the English courts, from which, as an important source of commercial law, most of our own rules upon the subject have been derived."

THE RIGHTS GIVEN THE HOLDER IN DUE COURSE UNDER THE NEGOTIABLE INSTRUMENTS LAW.—The law reads that "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defences available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." It might not be easy to say what this section (57) meant by "defect of title" or "defences available to prior parties among themselves," if we did not have the well settled law existing prior to the adoption of the statute to aid in construing it. With

this aid it is clear that what is meant is that the holder in due course takes free of personal defences or equities though he does not take free of absolute defences. We have already considered what defences fall under each heading.

WHEN SUBJECT TO ORIGINAL DEFENCES.—In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defences as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter. One who is not a holder in due course is (1) a person who has not given value; that is, a donee; and (2) a person who has notice of a defence. We have seen that a holder may give partial value and will, therefore, become a holder in due course, to the extent of the value of which he has given. It is also conceivable that a holder may take with notice of a defect amounting only to a partial defence to the instrument. The last sentence in Section 58 imposes an important qualification to the rule that notice of a defect subjects one who takes the instrument to a defence. After an instrument has once come into the hands of a holder in due course, all personal defences or equities in favor of prior parties are thereupon cut off. As the holder in due course might enforce the instrument in spite of such equities, he may give his own rights to whomsoever he will. He will not lose his rights if he finds out the defence

subsequent to his acquisition of the instrument, and if he seeks to sell the instrument to another he may tell the purchaser the facts and the purchaser may safely buy. Although he will know there was an equity, he will also know that the equity has been cut off. This does not injure the party who had a personal defence. It is no more burdensome to him to pay a subsequent purchaser than it would be to pay the first holder in due course. Therefore, when any personal defence is raised, the question is not simply whether the present holder is a holder in due course but whether at any time subsequent to the delivery of the obligation, enforcement of which is sought, the instrument has come into the hands of such a holder.

CHAPTER VII

Liability of Parties

LIABILITY OF THE MAKER.—The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse. The case of Wolke v. Kuhne, 109 Ind. 313, is a good illustration of the problems that arise under this section (60). The plaintiff, Wolke, as maker, together with a surety by the name of Trentman, made a note payable to the order of Woollen, the attorney general of the State. Kuhne, the present holder in due course, took title from Woollen. The defence was that Woollen had no right to transfer the note. The court said: "The appellants are not in a situation to dispute the authority of the payee to accept and transfer the note executed by them. Whatever may be the right of the State, it is certain these appellants cannot successfully present the question of the authority to T. W. Woollen to take or transfer the note executed to him. That is a question between him and the State, with which these appellants have no concern, for they have executed a commercial note, fair on its face and complete in all its parts, and they cannot defeat it in the hands of a bona fide holder. The makers of a note negotiable under the law merchant warrant the capacity of the payee to transfer it in the usual course of business. The execution of a

negotiable note is a warranty of the existing capacity of the payee to indorse the paper. The person to whose order a bill or note is made payable is generally vested with the right to transfer the same by indorsement; and it does not lie with the maker or acceptor to dispute the power of the payee to indorse and transfer the instrument. By making the note or accepting the bill, and issuing it, the maker and acceptor assert to the world the competency of the payee to negotiate and assign the paper; and they are not afterwards permitted to gainsay the assertion so made."

LIABILITY OF THE ACCEPTOR AND THE DRAWEE.—The Negotiable Instruments Law provides that the acceptor engages that he will pay the instrument according to the tenor of its acceptance, and admits (Section 62):

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and

2. The existence of the payee and his then capacity to indorse.

The drawer, the maker and the acceptor, thus, by signing, admit the existence of the payee and his capacity to indorse the instrument. If he becomes incapacitated to indorse after the instrument is drawn, however, that may be set up as a defence. The acceptor further admits not only the existence of the drawer but the genuineness of his signature and his capacity and authority to draw the instrument. That is a matter that has given rise to a good deal of liti-

gation. The result of the cases prior to the Negotiable Instruments Law was generally the same as is now stated in the statute. The reason for the result as generally given is that the drawee is bound to know the signature of the drawer. Accordingly, if a holder for value presents a check or presents a bill of exchange to the drawee, and the drawee pays it, the money cannot be recovered, although the signature is forged. The drawee must look out for that before he pays, and an acceptor similarly must be on his guard when he accepts the instrument. So a bank when it certifies a check becomes absolutely liable to pay it to a holder in due course, even though the drawer's signature was forged. (Sections 23, 60-62.) The drawee until he accepts a bill is not liable on the instrument, but he may be liable by virtue of a collateral contract with the drawer. For instance, if a bank fails to honor a check drawn upon it when the drawer has funds, the bank will be liable not on the check and not to the holder of the check, but to the drawer of the check on his implied contract with the bank when he became a depositor, that the bank would honor such checks as he should draw within the limits of his account. The acceptor when he accepts becomes the party primarily liable on the instrument, and of course the maker of a note is similarly liable. (Section 60.) The normal and only proper way of accepting a bill is in writing on the bill signed by the drawee, but the statute holds a written promise by the drawee, though not on the bill, binding upon one to whom it is shown and who on the faith of it receives

the bill for value. (Sections 134, 135.) The statute (Sections 139-142) distinguishes general acceptance from qualified acceptance. A holder is entitled to a general, that is, an unqualified acceptance, and if the drawee refuses to give it, may treat the bill as dishonored (Sections 142-149), but the holder may, if he chooses, take an acceptance varying from the tenor of the bill in amount, place, time or otherwise. If he does so, the acceptor will be liable according to the terms of his acceptance—not according to the terms of the bill as originally drawn. The drawer and indorsers will be discharged since they never agreed to be responsible for such a qualified acceptance; but they can assent to be so responsible, and if after notice of the qualified acceptance they do not express dissent to the holder, they will be deemed to have assented. (Section 142.)

LIABILITY OF THE DRAWER.—The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse, engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder. The drawer of a bill orders the drawee to pay. He does not in words say, "And I promise to pay if the drawee does not," but he implies that promise by drawing the bill,

and he may not only promise to pay the instrument if the drawee fails to pay it, but also if the drawee fails to accept it. A demand bill does not contemplate an acceptance, but a time bill (and in Massachusetts, New Hampshire and North Carolina, a sight bill), does, and a drawer of such a bill promises in effect, "If this instrument is presented for acceptance it will be accepted, or if not, on due notice I promise to pay it; and, further, if it is not dishonored for nonacceptance and is presented for payment at the day of maturity, I promise that if it is not then paid, on due notice of that fact I will pay it." The holder of such a bill need not present it for acceptance unless he likes. He may wait until the day of maturity and then simply present it for payment; but if he presents it for acceptance and the instrument is not accepted, he must then give notice of dishonor to the drawer, for the drawer's obligation is conditional, not simply on the failure of the drawee to accept and to pay, but also on proper notice of such failure being sent to the drawer. The holder, after failing to give notice of dishonor for nonacceptance, cannot thereafter charge the drawer by presentment at maturity for payment, giving notice of nonpayment. The drawer may expressly prescribe other conditions limiting his obligation to pay the instrument, but it is not at all common for him to do so (Section 61).

THE ANOMALOUS PARTY TO NEGOTIABLE PAPER.—When a person places his signature upon an instrument otherwise than as maker, drawer

or acceptor, he is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. There have been many cases in the past raising the question of the liability intended to be assumed by one who placed his name on negotiable paper in an unusual way.. Most of these cases, it is true, related to what are called irregular indorsements. But it is possible for one to become a party to an instrument as a guarantor. So one who signs on the back of negotiable paper may intend to assume the liability of a maker rather than of an indorser. It is possible under the Negotiable Instruments Law to give effect to any such intentions if they are clearly manifested, but this section of the statute provides a rule of presumption applicable where it is not made perfectly clear that another meaning is intended (Section 63).

THE INDORSER'S CONTRACT AND TRANSFER BY DELIVERY.—We shall treat these two subjects together because the Negotiable Instruments Law combines the two topics. As we have already seen, no indorsement is necessary where the instrument is payable to bearer. When an instrument is a bearer document, we may negotiate it by delivery. The Act puts negotiation by delivery and by qualified indorsement together. Before proceeding further, the student should turn to page 179 and study carefully the different forms of indorsement. This is absolutely necessary in order to understand properly what is to follow. We find that the usual qualified indorsement is that reading: "John Jones, with-

EXAMPLES OF INDORSEMENTS

Blank Indorsement: FRANK CHANDLER.

Special Indorsement: Pay to order of Richard Day. CHARLES JESSUP.

Qualified Indorsement: Without recourse.
EDWARD WHITE.

or

Pay to Richard Day, without recourse
EDWARD WHITE.

Restrictive Indorsement: Pay to Richard Day for collection. CHARLES STODDARD.

or

Pay to Bank R, for collection for my account.
CHARLES STODDARD.

or

Pay to Richard Day for my use.
CHARLES STODDARD.

Conditional Indorsement: Pay to William Wright or order if . . . AUGUST LOCKE.

Waiving conditions: Waiving protest.
AUGUST LOCKE.

or

Pay to Harry Doe, waiving protest.
ALFRED ALLEN.

There may be successive indorsements as follows:

Pay to Percy Adams. ROBERT WILSON.

Pay to Morgan & Green. JASON RALPHS.

Pay to Adolph Weiner.
WILLIAMS & WILSON.

etc., etc.

out recourse." Hence, an indorsement in that form imports the same contract as negotiation by delivery where there is no indorsement.

CONTRACT OF WARRANTY.—The liability incurred by either the qualified indorser or the negotiator by delivery is this: every person negotiating an instrument by delivery or by a qualified indorsement, warrants (Section 65):

1. That the instrument is genuine and in all respects what it purports to be;

2. That he has a good title to it;

3. That all prior parties had capacity to contract;

4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty does not extend in favor of any holder other than the immediate transferee. The provisions of subdivision 3 of this section do not apply to persons negotiating public or corporation securities other than bills and notes.

WARRANTIES.—The law of warranty in regard to negotiable instruments is based on the same principle as the law of warranty in the sale of chattel property. If a seller induces a buyer to purchase by making a representation of the title or the quality of the goods sold, he becomes a warrantor of the truth of his statements. Had he merely expressed an opinion instead of making a positive affirmation he would not have been so liable. The law also recognizes that

even though no express affirmation is made, the very act of offering goods for sale carries with it an implied representation. One who purports to sell goods impliedly represents that he is the owner, and, therefore, impliedly warrants his title. So we find it recognized in the law of negotiable paper that one who sells it impliedly warrants his title and warrants that the instrument is what it seems to be, namely, a genuine instrument, and that the parties who purport to have signed have actually signed and have the capacity to sign. There is no warranty implied, however, of the solvency of the parties, nor is there a warranty that none of the parties has a defence to the instrument unknown to the seller.

LIABILITY OF A GENERAL INDORSER.—We shall now consider the liability of the general indorser. It is this liability which we ordinarily have to deal with when we are faced with the problem dealing with the liability of the parties to negotiable paper. Every indorser who indorses without qualification, warrants to all subsequent holders in due course (Section 66):

1. The matters and things mentioned in subdivisions one, two and three of Section 65; and

2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due presentment it shall be accepted or paid, or both, as the case may be according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the hold-

er, or to any subsequent indorser who may be compelled to pay it. An indorser's main obligation is, of course, an undertaking that on presentment a bill shall be accepted or shall be paid at maturity, or both, and similarly he engages that a promissory note shall be paid at maturity on presentment, subject in both cases to proper notice being given of dishonor. He also makes certain warranties in regard to the instrument itself, and even one who indorses without recourse, or who transfers by mere delivery, paper payable to bearer, makes certain warranties, the most important of which is that the instrument is genuine and is what it purports to be. Accordingly, if there is any forged signature on negotiable paper, one who indorses without recourse would be liable to the purchaser for such damage as the forgery caused. One who sold such an instrument without any indorsement would also be liable to the same extent. Furthermore, it is warranted by the transferror, whether an indorser or not, that he has title to the instrument, and that all the prior parties had capacity to contract. If the instrument is simply transferred without indorsement, the seller also warrants that he has no knowledge of any fact which would impair the validity of the instrument and render it valueless. The provision as to capacity to contract does not apply to the sale of bonds of corporations or public securities, but the provision as to genuineness would apply to any negotiable instrument which is sold. (Section 65.) Indeed, the law is the same on this point when any personal property is sold. The Negotiable Instruments Law provides that

where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

THE IRREGULAR INDORSER.—Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser, in accordance with the following rules (Section 64):

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

Ordinarily an indorsement is both a transfer and a special kind of guaranty, but it may be only one of these things or it may be neither. Thus, an indorsement without recourse is a transfer but is not a guaranty. An anomalous indorsement is not a transfer but it is a guaranty. So an indorsement of an instrument negotiable by delivery, though unnecessary to transfer the instrument, is effective to create the liabilities of an indorser. (Section 67.) And there is one kind of indorsement that is neither a transfer nor a guaranty, but merely a receipt. Suppose a check is presented by the payee at the bank on which it is drawn. The bank asks for the payee's indorsement. Now that signature will not enable the bank under

these circumstances to sue the indorser, even though the drawer had in fact no funds or the drawer's signature was forged; it is simply an acknowledgment or receipt for the money. But the anomalous or irregular indorsement, though not a transfer, is a guaranty of the same sort that an unqualified regular indorsement is. It is called anomalous or irregular because it is made by one who is not a party to the instrument nor a holder of it. A makes a note payable to bank B and gets C to sign at the time of the transaction as an indorser for security. C was never, of course, a holder of that instrument, and consequently the indorsement is not a transfer. The same practical result might be reached and often is reached by a regular indorsement. A might have made that note payable to C and then got C to indorse it to the bank. Under the transaction in that form the bank would as before have the signatures of A and C, but here C would be a regular indorser, as he was the payee of the instrument. Before the passage of the Negotiable Instruments Law an anomalous indorser was held in some States a joint maker of the instrument; in others, varying kinds of obligations were held to be created by such an indorsement. This led to all kinds of trouble; but this situation has been changed by the passage of the Negotiable Instruments Law, which provides in Section 63 that where a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as an indorser to parties who take the instrument subsequently; and he is entitled to the same diligence on

the part of the holder in order to charge him as is required in order to charge a regular indorser. It is broadly provided also in Section 64 that if a person places his signature on an instrument otherwise than as drawer or acceptor he is bound as an indorser, unless he clearly indicates by appropriate words another intention.

ORDER IN WHICH INDORSERS ARE LIABLE.—As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally (Section 66). Indorsers, as between themselves, are bound in a fixed order. That is generally the order in which the names appear on the paper, but conceivably it might not be. Thus, a second indorser might place his name above a prior indorsement, but that would not render him a prior indorser. So, also, several indorsers might be jointly liable. They may all have indorsed as co-sureties. In that case, as between one another, they would have to share the loss equally; but generally as between themselves indorsers are liable in the order in which their names appear. The last indorser can sue the preceding one and so on (Section 121), but so far as the holder is concerned this order makes no difference. He can charge all the indorsers at once on dishonor of the instrument, and he can bring an action or actions against all of them at the same time. (Section 84.) He may sue

any one or all of them before he sues the party primarily liable, or he may sue the indorsers at the same time that he sues the party primarily liable; and the holder may get judgment against all of these parties for the full amount of the bill or note, the only limit to his rights being that he can collect on his judgments only the full amount of the instrument.

TRANSFER BY AN AGENT OR BROKER WHO FAILS TO INDORSE THE INSTRUMENT.—Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by Section sixty-five of this Act, unless he discloses the name of his principal, and the fact that he is acting only as agent (Section 69). Though the law of undisclosed principal does not apply to obligations on negotiable paper (the rule being that only the party named on the paper as contracting is bound, whether he be in fact principal or agent), the obligations named in Section 65 are extrinsic and collateral, not on the paper itself. Accordingly, if an agent does not disclose his principal when he sells a negotiable instrument, he would be personally liable as a warrantor, but if the agent was acting within his express or implied authority the principal also would be liable.

CHAPTER VIII

Presentment for Payment

PRESENTMENT IS UNNECESSARY TO HOLD THE PARTY PRIMARILY LIABLE.—Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers. The party primarily liable may be sued without any previous demand on the maturity of the instrument. This is true even though such party does not know who is the holder and the instrument is not made payable at a particular place, so that tender of payment is impossible. It is also true though the instrument is payable on demand. Demand paper is payable without a demand, paradoxical as it may seem. Presentment, before the passage of the Negotiable Instruments Law, in some jurisdictions at least, was necessary to charge the party primarily liable if the instrument was payable at a particular place; but that is not so now. Even under the Negotiable Instruments Law, however, if presentment was in express terms required by the instrument presumably it would have to be made. It would be possible, of course, to write

an instrument with such a condition in it, but that is not at all customary in the ordinary forms of notes.

PRESENTMENT IS NECESSARY TO CHARGE PARTIES SECONDARILY LIABLE. —In order to charge parties secondarily liable, on the other hand, presentment to the party primarily liable is always necessary unless the contrary is provided. It is perfectly possible here, also, to provide in the instrument contrary to the general rule. An indorser may agree to be liable without presentment to the maker.

TENDER.—Damages may be stopped or limited at any time by tender. Tender stops interest and stops a right to any additional damages subsequent to the time of tender. It is sometimes supposed that tender discharges a debt, but, of course, that is not so. What is tender? Strictly, tender is an offer of an amount of legal tender money equal to the indebtedness of the person tendering. Nothing but legal tender is sufficient, but unless the creditor requests legal tender, or rather unless he objects to the form in which tender is made, an offer of any ordinary medium of payment, such as a certified check, would be sufficient. The creditor has a right to say, "I want legal tender offered to me," but if he does not say that, the certified check will do as well. Tender ordinarily implies an offer to the creditor in person, but not necessarily. Suppose an instrument is payable at a particular place. If the debtor goes to that place ready and willing and able to offer payment, but

the creditor is not there, that is a good tender. Accordingly, if a note is payable at a bank, and the maker of the note has on deposit at that bank on the day of maturity an amount sufficient to meet the obligation, that serves as an automatic tender. If the creditor comes to the bank he can get it; if the creditor does not come, the mere fact that the money is at the place waiting for him will stop interest. (Section 70.) The tender will not only stop interest and further damages, but it will also operate as a discharge of subsequent parties on the instrument. It will not discharge the debt so far as the person tendering is concerned, nor so far as any prior party is concerned, but as to subsequent parties it does in effect amount to a discharge. (Section 120, subdivision 5.) The reason is that since the holder, when the tender was made, might have had his money if he had wanted it, it is unfair, when the only reason he does not get paid is his own refusal or neglect, that he should thereafter charge a subsequent party. In order to be valid, of course, the tender must be sufficient in amount.

KINDS OF INTEREST.—Not only are there questions arising in regard to the principal sum which is due upon a note, but there are questions in regard to interest. Interest is of two sorts: the first is interest agreed upon by the parties, sometimes called conventional interest, which means interest contracted for; the second kind of interest is given by the law as damages irrespective of any agreement on the part of the parties. Another kind of charge which is some-

what like interest in its nature, though not exactly the same, consists of percentages allowed in lieu of what is called re-exchange.

CONVENTIONAL INTEREST.—In the first place, conventional interest must be reserved in the note. Unless the instrument says something to the contrary, the interest will run from the date of the instrument; that is so provided in Section 17 of the statute. If the instrument is not dated, then interest will run from delivery, always assuming that the note provides for interest. A postdated or antedated note will get so much the less or more interest. If the note does not state how long the interest is to run, as generally it does not, it will run until the note is paid. That seems obvious where the interest is as high or higher than the legal rate, but it is also true if the interest is lower than the legal rate. For instance, suppose a note payable in one year with interest at 5 per cent. is not paid at maturity. Had there been no interest mentioned in the note the interest from maturity would run at the legal rate which is generally 6 per cent. and it sometimes seems hard to the holder of such a note that he should be worse off in having an interest-bearing note, so far as the period after maturity is concerned, than a man would be who had a non-interest-bearing note; but that is the rule. The contract rate governs not only before maturity but after. When the note is reduced to judgment, the judgment bears interest at the legal rate.

CONSTRUCTION OF AMBIGUOUS AGREEMENTS FOR INTEREST.—A note not in-

frequently reads simply, "with interest." That is understood to mean with interest at the legal rate. But sometimes this case is presented: there is a blank form used and the form reads, "With interest at—," and does not mention any rate, but leaves a blank, or reads "with —— interest." In the first place, that is an incomplete instrument, and any one who takes it with those blanks in it will be obliged to find out at his peril what is the real authority to fill out the blanks. If the parties really bargained for 5 or 3 per cent. interest, that is all the interest that can be recovered, and if they bargained that there should be no interest, we presume that also would be provable and that no interest could be recovered. If the blanks were filled out before maturity and a holder in due course took the instrument, he would be entitled to recover on the instrument according to the way the blanks were actually filled out. We may suppose, however, that the parties when they made the note made no agreement as to interest—said nothing about it; there would then be no evidence of the rights of the parties except what the note itself furnished. We suppose in that case interest at the legal rate would be allowed, though it has been argued that an instrument reading, "With interest at —— per cent.," or "With —— interest," until the blank is filled out, in effect says with interest at no per cent., or with no interest. It has been decided in one case, however, that the legal rate is the fair meaning.

INTEREST AS DAMAGES.—In the next place we will consider the question of interest recoverable

as damages. It follows from what we have already said that such interest is recoverable only in case there is no agreement for interest in the note at all. In such a case interest at the legal rate runs from the maturity of time paper, and on demand paper runs from delivery.

CALCULATION OF INTEREST.—A question has been raised as to the calculation of interest. Interest is ordinarily calculated by business and financial people on the assumption that there are three hundred and sixty days in the year. The result of that method of calculation is frequently that a little more interest is charged than is actually earned; that is, 1-360 of 6 per cent. is charged for each day instead of 1-365. This trivial inaccuracy in the calculation of interest ordinarily makes no difference, but it becomes of importance in certain States where usury laws forbid charging more than a given rate of interest, say 6 per cent. In a State where such a law prevails it might be usurious to charge interest calculated on the basis of three hundred and sixty days to the year, and probably as a matter of strict law, even where there is no usury law, if any one liable to pay interest insisted on having his interest calculated exactly on the basis of three hundred and sixty-five days in the year, so that he would pay only 1-365 of the annual rate for each day instead of 1-360, as commonly calculated, he would be entitled to make that demand. In a few States special statutes have been passed legalizing the ordinary method of calculating interest. Even without such statutes courts have

generally concluded that "six per cent." as used in a usury statute means six per cent. as ordinarily calculated by business men.

USURY.—Usury is generally defined as the taking or receiving, with corrupt intent, money, goods or things in action at a rate of interest greater than that allowed by statute. It is impracticable to do more than outline the principles of these usury statutes in the various States. Most States set the legal rate of interest at 6 per cent, but the effect of charging more than that rate differs in the various States. Thus, in Massachusetts any rate of interest may be charged, but if no rate is specified by the parties 6 per cent is the rate which governs. There is, therefore, practically no usury law in that State. Going to the other extreme, we have the New York law, which makes the legal rate of interest 6 per cent, in ordinary transactions and works a forfeiture of both principal and interest on the part of the lender charging more than that amount. Then we have intermediate laws, like those in New Jersey, where the legal rate is 6 per cent, but a charge over that amount simply works a forfeiture of the interest for the lender without affecting his right to recover the principal. Then again, there are special provisions in many States to meet special situations. It is not uncommon now to find laws similar to those of New York and New Jersey to the effect that a corporation may not set up the defence of usury. Again, any rate of interest may be charged on call loan in New York. A person, therefore, is obliged to become familiar

with the usury law of the jurisdiction governing the negotiable document in question. A promissory note is controlled as to matters of usury by the law of the State where the note is made, dated and payable, and not by the law of the State where it is negotiated. It is a general principle of law applying to all usury statutes that they are strictly construed and their operation is confined by the courts in every possible way.

THE EFFECT OF USURY.—As we have seen, the statutes in the different States vary so that the effect of usury is not the same in every State. Even if the statute makes the instrument void as between the immediate parties, does it have the same effect in the case of a usurious negotiable document in the hands of a holder in due course? This raises the question whether the Negotiable Instruments Law has repealed the usury law in the States where it has been enacted. It has been held generally that such is not the case, as in Alexander v. Hazelrig, 123 Ky. 677, but there are several contra decisions.

EVASION OF THE USURY LAW.—The courts are full of cases showing various attempts to avoid the usury laws. This is frequently so carefully handled by the parties to the transaction that the evidence cannot be put before the court, but granting that the court has sufficient evidence, it always looks with disfavor on any attempt to avoid a usury law. The recent case of Robinson, Thieme and Morris v. Whittier, 191 Pacific Reporter 763 is a good illustration. The opinion of the court in that case reads:

"This is an action upon four promissory notes aggregating $3,250. * * * Defendant Whittier answered with the defense of usury. * * * The notes, in the total sum of $3,250, bearing 8 per cent interest per annum, were dated August 2, 1918, and were made payable at several dates from August 15 to October 15, 1918. It is conceded that Whittier received only $2,250. Appellant claims the transaction was not usurious and attempts to vindicate the additional $1,000 (which, by being included in the notes, was to bear interest) upon the claim that it was intended as pay to appellant for services to be rendered, according to the terms of a separate writing therefor, signed by Whittier at that time. Whittier was engaged in a small logging business in King County. He became financially embarrassed. He applied to appellant for a loan, explaining his condition. Appellant was engaged in the real estate, loan, and insurance business in Seattle. Whittier asked for a loan of $2,000, but finally decided on $2,250. George R. Thieme, who conducted the negotiations for the appellant, made Whittier come back several times, and finally Whittier told him that rather than fall down on the proposition he could afford to and would pay $1,000 for the loan. Then the notes and mortgage were prepared and given, and at the same time, upon requirement of the appellant, there was signed by both parties, the written instrument in question, wherein appellant agreed 'to visit the timber operations of the party of the first part from time to time, inspect the operations, advise regarding the purchase of equip-

ment, cooperate in making of sales, and generally give first party the benefit of the business judgment and experience of the party of the second part.' In support of the legality of this agreement it is argued by appellant that if the circumstances attendant upon the making of a loan may require any kind of services to be rendered to the borrower, for such services rendered in good faith the lender may properly require compensation, in addition to a reasonable amount of interest upon the money loaned. The argument may be conceded, since the proposition contained therein admits the quality or test of good faith. A money lender bent upon violating the rule of public policy contained in the statute against usury not infrequently resorts to the subterfuge of a contemporaneous contract to pay for services rendered or to be rendered by the lender or for profits earned upon a transaction other than the making of the loan, to conceal the true nature of the transaction. The form of the agreement is immaterial; and as was said upon this subject in Uhler v. Olympia, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998: 'But we have steadfastly held that any device, however specious, to defeat the law will not be tolerated, and this, too, whether it is made the subject of proof or is apparent from the admitted facts.' The contract, couched in vague and general terms as to the kind of services to be rendered, is indefinite as to time. If measured by the length of time the notes were to run, then appellant was to receive $1,000 and interest out of ten weeks' output of this small logging business. Whittier failed and ceased

logging operations about the last of August. In proof of the good faith of the contract for services, appellant testified to what it actually did. There is some dispute in this regard, but we are satisfied, as evidently the trial court was, that it amounted to practically nothing. Thieme, who looked after the matter for the appellant, was inexperienced in conducting logging operations. He visited the camp two or three times before it closed down; for what purpose it is not shown; certainly he neither called for nor upon Whittier upon either of those visits. Whittier testified he had a foreman at the camp and that there was nothing for appellant to do and that it did not perform any services there. * * * We are satisfied the means employed amounted to a shift or device to cover illegal interest on money loaned, and that the transaction was usurious."

RE-EXCHANGE.—There is one other kind of damages, damages given in lieu of re-exchange. This involves an explanation of what is meant by re-exchange. In Pavenstedt v. N. Y. Life Ins. Co., 203 N. Y. 91, re-exchange is defined as "the additional expense of procuring a new bill for the same amount payable in the same place on the day of dishonor; or a percentage in lieu of such re-exchange in jurisdictions where it is prescribed by statute." The facts in the Pavenstedt case mentioned above are as follows: The defendant is a New York corporation. On May 22, 1902, in the United States of Colombia the defendant by its agent made and delivered to one Gonzalez its negotiable bill of exchange directed to

itself in New York, requiring itself to pay in New York to the order of the said Gonzalez three days after sight the sum of $4,181.60. The next day Gonzalez sold and indorsed the bill in Colombia to Bruer, Moller & Co., receiving therefor $234,169.60 in Colombian money, one dollar in American money being then worth fifty-six dollars in the money of Colombia. Bruer, Moller & Co. thereafter indorsed said draft to their agent in New York, G. Amsinck & Co., who duly presented the same to defendant for acceptance and payment, but acceptance and payment were refused, whereupon the draft was duly protested therefor. Subsequently G. Amsinck & Co. returned the draft to Bruer, Moller & Co., who in turn returned the same to Gonzalez and demanded of him $4,181.60, together with $20.96 interest and $2.90 expenses of protest, in American money, which said several sums Gonzalez thereupon paid to Bruer, Moller & Co. At the time when the defendant refused to pay said draft or bill of exchange and at the time of its return to Gonzalez and the payments made by him to Bruer, Moller & Co. one dollar of American money was worth ninety dollars of Colombian money. By reason of the refusal of the defendant to pay the draft presented Gonzalez was compelled to procure and did procure at the city of Bucaramanga $4,204.86 and was compelled to pay and did pay therefor $376,344 of Colombian money whereby Gonzalez has been damaged in addition to the face value of the draft and interest and protest fees in the sum of $1,579.72 in American money, and on April 21, 1904,

there was due from defendant to Gonzalez the sum of $5,785.18 in American money with interest thereon. Upon that day Gonzalez assigned his claim to the plaintiff. No part thereof has been paid except $4,859.31, which has been paid to the plaintiff by the defendant since the commencement of this action and which was received by the plaintiff in payment and satisfaction of the face of said draft, interest thereon and protest fees under a written stipulation that the acceptance of the amount paid would in no way affect, limit, or prejudice the plaintiff's right to recover from the defendant the balance of $1,579.72 with interest from the 25th day of August, 1902, for which amount plaintiff demands judgment. * * * The question presented by the appeal is a question of the measure of damages. * * * The damages recoverable by the payee of a negotiable foreign bill of exchange protested for non-payment against the drawer may be deemed to be made up as follows: (1) The face of the bill; (2) interest thereon; (3) protest fees; (4) re-exchange, i.e., the additional expense of procuring a new bill for the same amount payable in the same place on the day of dishonor; or a percentage in lieu of such re-exchange in jurisdictions where it is prescribed by statute. By some judges and text-writers the term "re-exchange" is employed in a broader sense to signify all these elements taken together; that is, the whole amount for which the payee is entitled to draw a new bill by reason of the dishonor of the original instrument. * * * Taking the facts just as they are stated in the com-

plaint, and bearing in mind that the payee of the bill (or his representative) is suing here, what amount of money will afford him complete redress? * * * The law does not insist upon an actual re-drawing, but it enables the holder to recover what would be the price of another new bill at the place where the bill was dishonored, or the loss on the re-exchange; and this it does by giving him the face of the protested bill with interest, and the necessary expenses, including the amount or price of the re-exchange. * * * It will aid us in applying the rule of re-exchange to the circumstances of the present case to paraphrase the illustration above, quoting from Byles on Bills, by substituting Colombia and New York for London and Vienna and the drawer of the bill for the indorser. * * * Even if the defendant had not actually paid this amount representing the face of the original bill with interest and protest fees, the sum would have been the limit of the plaintiff's recovery; because it would have sufficed to pay the new draft which he was entitled to draw under the doctrine of re-exchange. * * * According to the complaint the defendant has paid to the plaintiff and the plaintiff has received in payment and satisfaction of the face of the draft, interest thereon, and protest fees the sum of $4,859.31. * * * The damages recoverable now are to be measured by the rights and obligations of the parties as they existed then; and it follows that the defendant is not liable for any more than it has paid."

Unless it is otherwise provided by statute, notes

are not subject to the rules of exchange and re-exchange. There is, of course, no objection to having the parties stipulate for the rate of exchange between the place of making and the place of payment. Some cases have held that the creditor is entitled to his money at the place of payment without deduction and if he is obliged to collect in another place, he is entitled to a sum sufficient to make it equal the amount in the place where it should have been paid.

PROTEST FEES.—Protest fees also may be added as part of the damages due on an instrument, and become part of the obligation of all parties to it.

PRESENTMENT WHERE THE INSTRUMENT IS PAYABLE ON DEMAND AND WHERE IT IS NOT PAYABLE ON DEMAND. —Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

DATE OF MATURITY IMPORTANT FOR THREE QUESTIONS.—The next question to determine is when an instrument is overdue. That is necessary for several purposes, and unfortunately under our law an instrument may not be overdue for all these purposes at the same moment. There is a good deal of confusion about overdue paper because these several questions which may arise with reference to overdue paper are not kept apart. The first and

primary question in regard to when paper is overdue is: When can you sue the party primarily liable? The second question is: When can you give notice of dishonor to parties secondarily liable that the instrument has been dishonored at maturity? The third question is: When is the instrument subject to personal defences if purchased thereafter?

IN EUROPE OVERDUE FOR ALL PURPOSES AT THE SAME TIME.—Under the practice on the continent of Europe, of marking on the face of a bill the fact of its dishonor or its payment on presentment, the difficulties that beset our law in regard to this matter do not occur. The answers to each of these three questions on the continent of Europe will always be the same. Whenever a right of action against the maker accrues it will be time to give notice, and thereafter the instrument will always pass subject to equities. But now let us see how it works in this country.

WHEN RIGHT OF ACTION ARISES IN THE UNITED STATES.—It is the rule in simple contracts that when a man contracts to do something on a given day he has until the last minute of that day to discharge his obligation. That is true both of contracts to pay money and of contracts to do other things. If by a simple contract one agrees to pay $1,000 on the 2d of January, he cannot be sued on that obligation until after the last minute of the 2d of January has expired, for until that last minute it is possible he may fulfill his contract. The result is that a right of action will not accrue on that con-

tract until the 3d of January. That principle, unfortunately, has been applied rather generally to negotiable instruments. If a note is by its terms payable on the 2d of January the general rule is that no action can be begun against the parties until the 3d of January. The instrument is not overdue so far as the maker is concerned until then. That is probably contrary to the theory and customs of bankers and merchants. The theory of bankers and merchants is that the maker of the instrument agrees that he will pay it on presentment on the 2d of January, that the maker is not entitled to the last minute of the day, that he must be ready at the beginning of the business day, and that whenever his creditor presents that instrument to him, on that day, he must pay it. The law in Massachusetts and Maine, unlike the law of most of the United States, has to some extent recognized this custom. It has recognized it to this extent: if there is an actual presentment and dishonor on the 2d of January, a right of action against the maker arises immediately in favor of the holder; he does not have to wait until the last minute of the day, and therefore does not have to wait until the 3d of January to sue. But it is law in Massachusetts and Maine, as it is elsewhere, that if presentment is not made on the 2d of January (and under the Negotiable Instruments Law there is in general no reason to make presentment except to charge the indorsers, and therefore a note without indorsers need not be presented) the maker is not liable to suit until the 3d of January. The day of maturity is also affected by Sundays and

holidays. If the day of maturity falls on Sunday or a holiday, the instrument is not payable until the next business day, and time instruments payable on Saturday must also be presented on the next business day. (Section 85.) So much for an instrument being overdue for the purpose of a right of action against the party primarily liable.

WHEN INSTRUMENT IS OVERDUE FOR OTHER PURPOSES.—Secondly, when is an instrument overdue for the purpose of charging indorsers? For that purpose it is everywhere overdue as soon as it is presented and dishonored on the day of maturity (Sections 71, 83, 102). Thirdly, when is it overdue for the purpose of letting in equities? Everywhere but in Massachusetts, so far as it has been decided, the instrument is overdue for the purpose of letting in equities only on the day after that on which it falls due, that is, on the 3d of January. A purchaser on the 2d of January, unless he had notice that the instrument had been presented and dishonored, would be a holder in due course. One in Massachusetts who purchases on the 2d of January is not a holder in due course, unless Section 52 of the Negotiable Instruments Law has changed the law previously existing in that State.

WHERE AN INSTALLMENT OR INTEREST IS UNPAID.—One may suppose some rather special cases in regard to overdue paper; for instance, suppose an instrument payable in installments and one installment overdue and unpaid. Is that instrument, as a whole, dishonored? The answer to that

is, yes. On the other hand, if merely interest is due and unpaid, the note is not dishonored. A case arose in Wisconsin in which the instrument provided that if the interest was unpaid, the note should thereupon become due. The interest was unpaid and the note was purchased before the day it was due by its original terms, but the Wisconsin court held that the purchaser was not a holder in due course. He had bought after maturity, since the non-payment of interest made the whole note due.

WHEN RIGHT OF ACTION ACCRUES ON DEMAND PAPER.—A more troublesome question than that concerning the day of maturity of time paper is that concerning the day of maturity of demand paper, and here again we must make the distinction clear between these several questions of when a right of action arises, when the instrument is subject to equities, and when notice may be given to indorsers. On demand paper a right of action against the maker arises simultaneously with delivery. By the terms of the paper it might be supposed that demand was a prerequisite to such a right of action, and on theory it ought to be, but as has been said, in this country and England it is not. (Section 70.)

MATURITY OF DEMAND PAPER TO CHARGE INDORSERS.—The holder may make a demand on the maker within a reasonable time after the issue of the instrument for the purpose of charging indorsers, the instrument maturing at any time the holder wishes to present it. (Section 71.) The holder may demand payment at once of the party pri-

marily liable, and when he refuses to pay and notice is given to the indorser, the holder will acquire a right of action against the indorser.

WHAT IS A REASONABLE TIME FOR A BILL OF EXCHANGE.—Section 71 of the Negotiable Instruments Law provides that in the case of a bill of exchange payable on demand, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof. That provision is clearly a mistake. The rule before the passage of the Negotiable Instruments Law was that a demand bill of exchange might be negotiated as many times as the holder chose before presentment, provided that an unreasonable time never elapsed between one negotiation and the next; that is, it could be kept in motion, and so long as it was kept in motion it would not matter what was the total addition of the short periods between the several indorsements. But this section of the Negotiable Instruments Law says that it is all right if presentment is made within a reasonable time after the last negotiation. Apparently, therefore, we may have a demand bill of exchange and hold it for five years and then negotiate it, and everything will be all right if the bill is presented within a reasonable time after the last negotiation. Commenting on Section 71, Professor Brannan, in his recent work on the Negotiable Instruments Law, observes: "It is submitted that section 71 is defective in another respect. The last paragraph provides that an instrument payable on demand must be presented within a reasonable time

after its issue. This is all right as to the drawer of a bill or the maker of a note, but not as to an indorser. An overdue time note, both by the common law and by the statute is payable on demand and as against an indorser of such an overdue note presentment was required within a reasonable time from the indorsement, not from the issue of the note. Again a note originally payable on demand may be indorsed more than a reasonable time after its issue, in which case it would be manifestly impossible for the indorser to present the note within a reasonable time after its issue. Is the indorser therefore to be discharged? The language of section 71 seems to necessitate this result. In Anderson v. First Nat. Bank, 144 Iowa, 251, 122 N. W. 918 * * * it was held that under this section a certificate of deposit payable on demand must be presented within a reasonable time after its issue in order to charge an indorser. It has been suggested, in order to cure both the above-mentioned defects, that the last paragraph of section 71 be amended so as to read: 'Where it is payable on demand, presentment must be made within a reasonable time after its indorsement in order to charge the indorser, and in case of bill of exchange presentment for payment must be made within a reasonable time after its issue in order to charge the drawer.'"

PRESENTMENT FOR PAYMENT. — Presentment for payment is, as we have said, necessary to charge parties secondarily liable. It may be asked when presentment must be made, to whom it must

be made, by whom it must be made, and the place where it must be made.

PRESENTMENT FOR PAYMENT, TO BE SUFFICIENT, MUST BE MADE.—Presentment for payment, to be sufficient, must be made. (72.)

1. By the holder, or by some person authorized to receive payment on his behalf.

2. At a reasonable hour on a business day.

3. At a proper place as herein defined.

4. To the person primarily liable on the instrument or if he is absent or inaccessible, to any person found at the place where the presentment is made.

TIME OF PRESENTMENT.—As to the time, it must be at maturity of the instrument, if the instrument is a time bill, and if it is a demand instrument presentment must be made within a reasonable time. (Section 71.) The hour of the day when presentment is made must be reasonable. (Section 72, subdivision 2.) What is a reasonable hour of the day may depend on who is the drawee. In Chicago a case arose where it appeared that it was the business custom of banks to remain open between 3 and 6 o'clock, having some one in charge for the purpose of receiving presentment of instruments which had been rejected at the Clearing House. It was held in view of this custom that a presentment within these afternoon hours was presentment at a reasonable hour of the day. Unless, however, it was the custom of the banks to stay open after 3 o'clock it would not be reasonable to seek to present to the bank, as the party primarily liable on the instrument, after 3 o'clock in the day.

(See also Section 75.) But if the drawee was a business man in the same city, and the normal hours of his business extended until 5 or 6 o'clock, presentment as late as that might be permissible.

BY WHOM AND TO WHOM PRESENTMENT MUST BE MADE.—Now by whom must presentment be made? It must be made, as is provided in Section 72 of the Act, by the holder or some person authorized by him to receive payment. It must be presented to the person who is primarily liable on the instrument, or to the drawee of the bill of exchange or check, if there has been no acceptance of the bill or certification of the check. If the person primarily liable on the instrument is not at the place where presentment should be made, but somebody else is, payment should be demanded from him. He may be the authorized agent of the person primarily liable. If there are joint parties primarily liable, it must be presented to both (Section 78) unless they are partners, in which case presentment to one is enough. (Section 77.) If the party primarily liable is dead, presentment must be made to his executor or administrator. (Section 76.) In any of these cases, however, if a place of payment is specified in the instrument, presentment at that place on the day of maturity is sufficient.

PLACE OF PAYMENT.—Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented;

2. Where no place of payment is specified, but

the address of the person to make payment is given in the instrument and it is there presented;

3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;

4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence. (Section 73.)

IMPORTANCE OF SPECIFYING A PLACE OF PAYMENT IN NEGOTIABLE INSTRUMENTS.—It is worth while to call attention to the importance of having negotiable instruments always made payable at a particular place. This simplifies the duty of the holder. All he has to do is present the instrument there. It is also an advantage for the debtor, for all he has to do to make tender in order to stop interest is to have money at the place where the instrument is made payable. If there is no place of payment named, each party is at a disadvantage, for the debtor can never tell who may be holder at maturity; he has to depend on receiving notification of that, which may not be given him, and therefore he is unable to stop interest because the note may be negotiated to he knows not whom. The creditor is at a similar disadvantage if no place of payment is named, for he cannot tell where to make presentment.

PRESENTMENT INVOLVES SHOWING THE INSTRUMENT.—Presentment implies showing the instrument. It is not enough to demand pay-

ment. It is requisite for the creditor to say, in effect, "Here is the instrument on which you are liable and which I am ready to surrender on receiving payment." Some time ago there arose a New York case of an attempted presentment over the telephone, and the party primarily liable refused payment. The question was whether the parties secondarily liable could be charged on that presentment. A lower court in New York held that they might be, that the showing of the note was waived by the party primarily liable. We are not sure that the decision was right. Presentment is for the benefit, not of the party primarily liable, but of the parties secondarily liable. The parties secondarily liable have a right to say, "We will not pay unless there has been proper presentment." Now it seems that it can hardly be proper presentment unless the instrument is actually brought within reach of the party primarily liable and in effect offered to him. If presentment is good over the telephone from one bank to another in New York City, why is it not good as between New York and Chicago, without sending the note to Chicago, where it is payable?

THE REQUISITES OF PRESENTMENT WHERE AN INSTRUMENT IS PAYABLE AT A BANK.—Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient. The meaning

of "banking hours" depends upon the custom of the place of payment. Often a bank transacts the business of paying negotiable paper of certain kinds after the hour when ordinary deposits are received and checks cashed. Thus, as has been said, in Chicago it appeared to be the custom for banks to remain open between 3 and 6 p. m. for the purpose of meeting certain demands. A presentment of negotiable paper which was a demand of this sort was held seasonable when made between these hours.

REQUISITES OF PRESENTMENT WHERE THE PRINCIPAL DEBTOR IS DEAD.—Where a person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative if such there be, and if, with the exercise of reasonable diligence, he can be found. It is important to be sure that the person primarily liable is dead. Reasonable cause to believe him dead is not enough; and in an action against a party secondarily liable, death must be proved. Moreover, though death excuses presentment, it does not excuse the requisite notice of dishonor to parties secondarily liable.

PRESENTMENT TO PERSONS LIABLE AS PARTNERS.—Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm. Partners are jointly liable in most jurisdictions. In States where the Uniform Partnership Act has been adopted part-

ners are liable jointly for all debts and obligations of the partnership, and where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his co-partners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partners are liable jointly and severally therefor to the same extent as the partner so acting or omitting to act, as also where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it, and where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership. But there is this difference between joint obligors who are partners, and other joint obligors: Each partner is agent for the firm in all matters appropriate for the transaction of the firm's business. As this includes payment of negotiable paper, presentment to one is in effect presentment to all.

PRESENTMENT TO JOINT DEBTORS.—Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all. Though this section is headed in the statute, "Presentment to joint debtors," the heading is too narrow, for the section is applicable not simply to cases of joint liability, but to cases of persons severally liable or jointly and severally liable. If the parties primarily liable are liable severally, or jointly and

severally, each one may be sued separately; whereas if they are jointly liable, all must be sued jointly. But so far as charging parties secondarily liable is concerned, the situation is the same in all these cases. The indorser or drawer ought not to be held liable until it has been made manifest by due presentment that no one of the parties primarily liable will pay the instrument; and this can only be ascertained by presentment to all of them. A case may be supposed where strict presentment is not possible on the day of maturity to each of the parties primarily liable; they may live at places distant from one another, and the instrument may not be payable at a particular place, but Section 81 would excuse necessary delay.

WHEN PRESENTMENT IS NOT NECESSARY TO CHARGE THE DRAWER.—Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument. In certain cases non-presentment is excused. Sometimes it is excused altogether, as is provided in Sections 79, 80 and 82, and sometimes it is excused temporarily, as provided in Sections 81 and 147. It is excused altogether, the statute provides, wherever the party secondarily liable, who might complain of non-presentment, had no reason to expect that the instrument would be paid if presented. The mere fact that the drawer has no funds in the hands of the drawee has been held in the case of Life Insurance Co. v. Pendleton, 112 U. S. 708, not to excuse presentment. Particularly is this true where the drawer has made

provision for payment of any bill drawn by him on the drawee. Simonoff v. Granite City National Bank 279 Ill. 246. It is sufficient if the drawer has a reasonable expectation that the bill will be paid.

WHEN PRESENTMENT IS NOT REQUIRED TO CHARGE THE INDORSER AND ITS RELATION TO ACCOMMODATION PAPER.—Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented. This principle, which is established by the Negotiable Instruments Law, finds particular application in any case in which the instrument was made for the accommodation of the party secondarily liable, and therefore he himself ought to pay it, for it is the understanding, where paper is made for the accommodation of one who is secondarily liable on the instrument, that he shall save harmless the party who became primarily liable on the instrument, as matter of accommodation, and shall himself pay the instrument at maturity. Such a person secondarily liable on the instrument, whether he is a drawer (Section 79) or an indorser (Section 80), has no right to complain if the instrument is not presented to the party who is primarily liable.

EXCUSABLE DELAYS IN MAKING PRESENTMENT.—Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence.

When the cause of delay ceases to operate, presentment must be made with reasonable diligence. Presentment may be excused temporarily. This will be true whenever circumstances occur without the fault of the holder which make presentment at maturity impossible, but do not make it permanently impossible. (Sections 81, 147.) A common illustration of this would be where the maker of a note died and no executor or administrator had been appointed. That would excuse delay in presentment until the appointment of such an official, but when the cause of the delay ceased to operate, presentment would have to be made with reasonable diligence.

WHEN PRESENTMENT MAY BE DISPENSED WITH.—Presentment for payment is dispensed with:

1. Where, after the exercise of reasonable diligence, presentment as required by this Act cannot be made.

2. Where the drawee is a fictitious person.

3. By waiver of presentment, express or implied.

Presentment for payment is also excused where, after reasonable diligence, the presentment cannot be made, as, for instance, if it is impossible, with reasonable diligence, to find the person primarily liable in order to make presentment to him. Again, where the party primarily liable is a fictitious person, it is obvious there can be no presentment. (Section 82.)

WAIVER OF PRESENTMENT.—Another case and an important one is that in which presentment is waived. The waiver may be express or im-

plied. (Section 82.) Sometimes it is made at the time when the obligation of the drawer or indorser is undertaken. If waiver is made at this time, the consideration which supports this party's obligation also supports the agreement to waive presentment. Waiver of presentment may also be made after the drawer or indorser has signed, but prior to the day of maturity. In such a case the holder is justified in relying on the waiver and refraining from making presentment. There is what is called in the law a kind of estoppel in that case, since the holder's failure to make the presentment has been due to his reliance on the waiver. But the law has gone even further than this. Suppose the instrument has actually passed maturity and no presentment has been made, and therefore the party secondarily liable has been wholly discharged. Even then a waiver of presentment may be effectively made by him. In this case it is a waiver of a past default. That is an exceptional sort of case, for generally an agreement to give up a right requires consideration in order to make it valid, but here the party secondarily liable gives up his right, to rely on the lack of presentment as a ground of discharge, without any consideration. In order, however, to have a waiver of this last sort effective, the party who waives presentment must do so with knowledge of the facts; that is, he must know that the time for presentment has elapsed, and that there has been a failure to make due presentment. But it is not necessary for the validity of such a waiver that the party making it should know his legal rights;

that is, it is not necessary that he should know that the lack of presentment had discharged him. It is necessary only that he know the facts from which a lawyer would know that he had been discharged.

OTHER ILLUSTRATIONS OF EXCUSES FOR PRESENTMENT.—We will give one or two other illustrations of cases where it was claimed that presentment had been excused. In one case the president of a corporation indorsed the note of the corporation and before the maturity the maker was adjudged a bankrupt, one of the acts of bankruptcy of the bankrupt maker being the written admission of the indorser, the president of the corporation, that the corporation was unable to pay its debts and was willing to be declared a bankrupt. It was held on these facts that it was not necessary to present the note to the corporation—the maker—in order to charge the indorser. The indorser had no reason to expect that the note would be paid; indeed, he had every reason to know that it would not be. In another case the indorsers of a note had assured the holder that it could not be paid at maturity, and they knew that the maker, again a corporation, had not the money to pay. It was held that these indorsers were not discharged by the failure to present at maturity. They had virtually represented to the holder that there was no use in making presentment, and after they had taken that stand they could not complain that the holder relied upon it. Again, a firm made a note and one of the partners indorsed it. Shortly before maturity the indorser, in speaking to the holder regarding a general

assignment for the benefit of creditors which the firm was contemplating, told the holder that neither the firm nor he could pay the note at maturity, and no presentment was made, and here again it was held that there was a waiver. A still stronger case is that in which the indorser assured the holder before maturity that he, the indorser, would be responsible for principal and interest when it was due and would look after the collection. In short, any statement before maturity made by a party secondarily liable, the natural effect of which would be to induce the holder to refrain from making presentment to the party primarily liable, either because it was of no use to do so or because it was unnecessary to do so, since the party secondarily liable was going to pay it anyway, will excuse presentment.

DISTINCT AGREEMENT NECESSARY FOR WAIVER AFTER MATURITY.—But when it comes to a waiver after maturity, then you must have either a distinct promise to pay the note or a distinct agreement to waive it. The difference between the situation after maturity and before is, that after maturity the holder has already lost his rights by failing to make presentment at maturity, and in order to revive them a clear intention to pay is necessary.

WHEN AN INSTRUMENT IS DISHONORED BY NON-PAYMENT.—The instrument is dishonored by non-payment when:

1. It is duly presented for payment and payment is refused or cannot be obtained; or

2. Presentment is excused and the instrument is overdue and unpaid. (Section 83.)

Dishonor for non-payment is important as one of the steps essential in order to charge parties secondarily liable. It is not important otherwise, for as we have seen so far as parties primarily liable are concerned, a right of action accrues to the holder though the instrument has not been dishonored on presentment.

LIABILITY OF A PARTY SECONDARILY LIABLE WHERE THE INSTRUMENT IS DISHONORED.—Subject to the provisions of this Act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder. The words "subject to the provisions of this Act" in this section, refer to the necessity of notice of the dishonor. As will be seen, parties secondarily liable cannot usually be held unless prompt notice is given of the dishonor. (Section 84.)

TIME OF MATURITY.—Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due (or becoming payable) on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday. There are no days of

grace now in States where the Negotiable Instruments Law is in force (except on sight drafts, payable in Massachusetts, New Hampshire or North Carolina). Sundays and holidays are included in the count as intermediate days, that is, it does not make any difference how many Sundays and holidays there may be within the thirty days, but if the thirtieth day falls upon a holiday then the instrument is payable the next succeeding business day. The rule is otherwise where days of grace are concerned. If the last day of grace falls on a holiday, the instrument is due on the next preceding business day, for days of grace are never extended beyond three days. This principle is still important where the Negotiable Instruments Law is not in force, and also in regard to sight drafts in the three States above mentioned.

METHOD OF COMPUTING TIME.—Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment. In considering when an instrument has matured we must consider separately instruments payable on time and instruments payable on demand. In calculating the period for the latter the statute provides that the first day shall be excluded and the day of payment included. For instance, on a note dated the 2d of January, payable in thirty days, you do not count the 2d of January in figuring the time, but you do count thirty days beginning with January 3, and the thirtieth day will be

the day of payment. It would, of course, make no difference if you included the 2d of January and excluded the day of maturity. The important thing to remember is that you must not include both or exclude both.

THE RULE WHERE AN INSTRUMENT IS PAYABLE AT A BANK.—Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon. It was a disputed question in the common law whether a note payable at a bank was equivalent to an order on the bank to pay. The better view was in accordance with the present provision of the statute that this did amount to an order, and therefore made such a note (which was sometimes called a domiciled note) in effect a bill of exchange drawn on the bank. The coupons on bonds are frequently made payable in this way. In some jurisdictions, however, there has been hostility to this principle, and sometimes it was argued that making an instrument payable at a bank only gave authority to the bank to make payment, but did not order it to do so. Others argued that there was neither order nor authority. The omission of this section of the statute in a few States leaves the matter in somewhat dubious condition in those States. By Section 196 of the Negotiable Instruments Law, in the absence of an express provision on any point, the rule of the law merchant applies, and as it is somewhat uncertain what the rule of the law merchant on this matter is, there is chance for litigation.

WHAT CONSTITUTES PAYMENT IN DUE COURSE.—Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective. We have discussed in connection with personal defences the rights of holders in due course, that is, purchasers for value in good faith before maturity and without notice; but a bank is as much interested in payment of instruments in due course as it is in regard to purchases of them in due course. In general, the rules as to what is payment in due course are the same as the rules in regard to what is purchase in due course. In other words, one who pays under the same circumstances in regard to notice and value and good faith as a purchaser who purchases in good faith for value and without notice, will be protected in the same way. But in one respect a person who pays in due course stands in a better position than one who purchases in due course; or, rather, payment in due course is a little wider in one respect than purchase in due course. One is not a purchaser in due course who buys after maturity, but one who pays after maturity an instrument on which he is liable is as much protected as if he paid at the instant of maturity, and the reason for the distinction is plain. Nobody needs to buy paper after maturity unless he likes, but the maker of a note, from whom payment is demanded a year after maturity, is just as much bound to pay that note as if payment had been demanded promptly. It is therefore paying in due course to pay when

payment is demanded, even though that be long after maturity. A bank will accordingly pay a check even though it is not presented within a reasonable time. Whether there is any limit to this principle may perhaps be a question. Perhaps a bank would not without inquiry pay a check that was issued several years previously; certainly not unless it felt pretty well satisfied that everything was all right. But so far as the statute (Section 88) and the decisions go, no limit seems to have been set to the right of the parties liable on an instrument to pay after maturity, and a long time after. The position of a bank or a drawee who has not accepted the instrument is of course a little different from the position of one who has actually made himself liable on the instrument—as the maker of a note or the acceptor of a bill, or a certifying bank which has certified a check. As to such a person there seems to be no period short of the Statute of Limitations in which payment may not be demanded rightfully, and therefore no time beyond which the party liable may not properly pay.

CHAPTER IX

Notice of Dishonor

TO WHOM NOTICE OF DISHONOR MUST BE GIVEN.—When a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged. After presentment has been duly made, if the party primarily liable pays, of course the parties secondarily liable are excused. If the party primarily liable does not pay, then it is further necessary that the parties secondarily liable shall be notified, or at least that proper diligence shall be exercised in order to charge them. (Section 89.) This principle applies to all parties secondarily liable, even to the drawer of a check. By Section 186 the drawer of a check is not discharged by failure to present promptly, except to the extent that this delay actually works an injury; but presumably by a mistake on the part of the draughtsman of the Act, no special provision is made as to failure to give notice of dishonor of a check, and, therefore, by virtue of the general provision in Section 89 such failure discharges the drawer absolutely, whether he is injured or not. All indorsers, either on checks, ordinary bills of exchange or notes, must be notified. A joint maker need not be notified, even though he is a surety and that fact is stated in the note or known to the holder.

EXCUSE FOR PRESENTMENT DOES NOT EXCUSE NOTICE.—An excuse for making presentment does not excuse the failure to give notice. A waiver of presentment is construed as including a waiver of notice, but a mere excuse for not presenting does not excuse the notice. Indeed, frequently when presentment is excused the occasion is such that the indorser may particularly want notice. Thus if presentment cannot be made because the party primarily liable cannot be found, then the indorser ought to be notified of that so that he may, if he wishes, endeavor to find the missing party.

BY WHOM NOTICE SHOULD BE GIVEN.—The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who upon taking it up would have a right of reimbursement from the party to whom the notice is given. While notice may be given by the holder, it may also be given by anyone who acts on behalf of the holder. Even though he is not at the time an authorized agent of the holder, the latter may ratify subsequently the assumption of agency. Not only may the notice be given by or on behalf of the holder, but by or on behalf of any party to the instrument who might be compelled to pay the holder, and who upon taking it up would have a right to reimbursement from the party to whom the notice is given. Let us give an illustration. Suppose a note made by A and indorsed by B, C and D, respectively,—first, second and third indorsers. D, if compelled to pay, will have a right of

recourse against C and B. It is therefore important for D that B and C should receive due notice. Accordingly, D may notify B and C, and the notice that D thus gives will be as effective as if it were given by the holder. Similarly, C might notify B, but C could not effectively notify D, because even if C is compelled to take up the paper he will have no right of reimbursement from D, and therefore it is nothing to him whether D is charged or not. B cannot effectively give notice to anybody for the same reason, for if he is compelled to pay, there is no party who is secondarily liable against whom he would have any recourse.

NOTICE GIVEN BY AGENT.—Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not. This extends the ordinary principles of agency, since it allows notice to be given in the name of a party entitled to give notice though that party is not in fact the principal of the agent. A notice given by a notary in the name of the maker (who because he is the party primarily liable was not entitled to give notice) has, however, been held insufficient.

EFFECT OF NOTICE GIVEN ON BEHALF OF HOLDER.—Where notice is given by or on behalf of the holder, it inures to the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given. When a party secondarily liable is once charged by notice from the holder, any one who succeeds to the

title of the holder succeeds to the benefit of the notice, and it makes no difference whether the subsequent holder succeeds to the title by purchase or because he is a prior party on the instrument and has been forced to take up the instrument. The holder, however, is not bound to charge any party whom he does not wish to. He may be satisfied to charge his immediate indorser feeling sure he can get payment from him. This indorser, if he wishes recourse over against prior parties whom the holder has not charged, must assume the burden of giving them proper notice. It is, obviously, never safe to assume that a holder has charged all prior parties, so that any party secondarily liable when charged himself should promptly give notice to prior secondary parties.

EFFECT WHERE NOTICE IS GIVEN BY PARTY ENTITLED THERETO.—Where notice is given by or on behalf of a party entitled to give notice, it inures for the benefit of the holder and all parties subsequent to the party to whom notice is given. As not only the holder but other persons, as we have seen, are entitled to give notice, the same principle is applicable to other persons as is laid down in Section 93 of the Act as applicable to the holder. That is, for instance, if notice is given to the drawer of a bill of exchange by the first indorser, the holder can rely on that notice, as can all parties subsequent to the drawer.

WHEN AGENT MAY GIVE NOTICE.—Where the instrument has been dishonored in the hands of an agent, he may either himself give notice

to the parties liable thereon, or he may give notice to his principal. If he gives notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder. This provision is of some importance to banks, for banks are often agents for collection. Thus, where the instrument has been dishonored when in the hands of an agent for collection, that agent may either give notice to the party liable on the instrument or he may give notice to his own principal, and if he gives such a notice to his principal within the period that is necessary as between holder and indorser, the principal will have the same time in addition for giving notice to the drawer and indorsers.

WHEN NOTICE SUFFICIENT.—A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

FORM OF NOTICE.—The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

DESCRIPTION.—What sort of thing is a notice? In the first place, the notice may be oral as well as written, or partly oral and partly written. If writ-

ten, it need not be signed, but a holder should always give notice in writing and sign it. He would be foolish, also, not to keep a copy of the writing. This is not because these things are legally necessary, but to have ready means of proof. The notice should properly contain a sufficient description to identify the instrument, and should state that it has been dishonored either by non-acceptance or non-payment. A mistake in the description of the instrument, however, does not invalidate the notice, if the party secondarily liable is not in fact misled, as he would not be if there was no other note on which he was bound. It is well enough to state in the notice that the party secondarily liable is looked to for payment, but that is not necessary because it is implied from the mere circumstances of giving notice.

KNOWLEDGE IS NOT EQUIVALENT TO NOTICE.—A rather hard case presents these facts: a notice of dishonor and an envelope containing it were addressed to the second indorser, but they were delivered to the first indorser who read the notice. It was held, nevertheless, that he was not charged. The case brings out the important point that knowledge on the part of one secondarily liable that there has been presentment and dishonor is not a substitute for notice. We suppose the reason is that a notification, although it may contain simply a statement of the fact that the instrument has been dishonored, impliedly contains notice that the holder looks to the party secondarily liable for payment, and mere knowledge from outside sources that the instrument has

been dishonored does not necessarily indicate to the party secondarily liable that the holder is going to look to him for payment.

TO WHOM NOTICE MAY BE GIVEN.—Notice of dishonor may be given either to the party himself or to his agent in that behalf. Notice may be given either to the party secondarily liable himself or to his agent in that behalf, but here you must have a real agency, the scope of which includes authority to receive such notice, because there will never be any ratification of a notice given to one who purports to be the agent of a party secondarily liable though not such in reality. The question of what is a sufficient agency is rather an important one, especially in the case of a corporation. In a recent New York case a notice was left at the cash window of a hotel corporation, which was a party secondarily liable. It was held that that notice was not sufficient, as it did not in fact reach the hands of any person in authority. In a case of this sort it is often safer to send a notice by mail than to attempt to make a personal service, for in case of a notice sent by mail, if it is correctly addressed, the responsibility of safe arrival of the notice is on the person to whom it is addressed, whereas if the holder attempts a personal service he must at his peril make good service on the right person.

NOTICE WHERE PARTY IS DEAD.—When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal

representative, notice may be sent to the last residence or last place of business of the deceased. This section provides a rule for a difficult situation. In many of these doubtful cases a cautious person will give notice in more than one way in order to make sure that he has done everything that could possibly be required.

NOTICE TO PARTNERS.—Where the parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution. As partners are agents for each other in the firm business, the rule stated in this section is a natural one, and the same rule would apply to other joint parties where one had authority to receive notice for the other, even though the parties were not partners.

NOTICE TO PERSONS JOINTLY LIABLE.—Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others. The reason why each party must receive notice is similar to the reason which requires presentment to each of several persons primarily liable. Each has his own interest to protect and should be given a chance to protect it.

NOTICE TO BANKRUPT.—Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee. Though the statute permits notice to be given to either the insolvent, or to his trustee or assignee, the wise plan is to give notice to both.

TIME WITHIN WHICH NOTICE MUST BE GIVEN.—Notice may be given as soon as the instrument is dishonored, and unless delay is excused as hereinafter provided, must be given within the times fixed by this Act. A notice cannot be given until the instrument is actually dishonored. On the other hand, it may be given on the same day that the instrument is dishonored. An ordinary debt may be paid by the debtor at any hour of the day when the debt falls due. The fact that the debtor has not paid in the morning, or has even refused to pay in the morning, does not put him in default. He may pay in the afternoon; but a party primarily liable on a negotiable instrument is bound to pay on presentment at any time during business hours. If an instrument is presented to him at 9 o'clock it is dishonored, although he says he will pay it at 10 o'clock. He cannot himself be sued until the next day, but the parties secondarily liable may be effectively notified at once of the dishonor.

WHERE PARTIES RESIDE IN SAME PLACE.—Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.

2. If given at his residence, it must be given before the usual hours of rest on the day following.

3. If sent by mail, it must be deposited in the post office in time to reach him in usual course on the day following. (Section 103.)

The statute in this way distinguishes in regard to notice between cases where the person to be notified resides in the same city or town as the person giving the notice, and cases where he does not. If both reside in the same city or town, notice, if given personally, must be given by the next day following, at a reasonable hour. If sent by mail it must be mailed in time to reach the party to be notified in the normal course of business on the next day following. It makes no difference that it does not reach him, all that is necessary is that it shall be mailed so that it normally would. If given at the place of business it must be before the close of business hours; if made at the residence of the party to be notified, any time before the usual hour of retiring is sufficient, and the same distinction between place of business and place of residence is important if the notice is sent by mail. Supposing the usual hours of business close at 5 o'clock, a notice by mail addressed to the place of business would have to be mailed so as normally to reach the party before that hour, whereas if addressed to the home of the indorser the notice would have to be mailed in time, if by the normal course of post, to reach the indorser's residence by 6 or 7 o'clock.

EFFECT OF SUNDAYS AND HOLIDAYS AND SATURDAYS.—The question may be raised how a holiday or Saturday affects this question. The Act provides broadly, in Section 194, that anything that is required to be done on Sunday or a holiday may be done on the next succeeding business day. We suppose, therefore, that the period for giving no-

tice is extended by this provision so far as holidays and Sundays are concerned, but there is no such general provision as to Saturday. There is a provision as to presentment of notes maturing on Saturday (Section 85), but there is none in regard to notice on Saturday. It would seem, therefore, that the general rule as to notice on any ordinary day would also be applicable to Saturday, except that a notice required to be mailed so as to arrive, in normal course of mail, during business hours would have to be mailed earlier if it were expected to arrive on Saturday than if expected to arrive on another day.

WHERE THE PERSON GIVING AND THE PERSON TO RECEIVE NOTICE RESIDE IN DIFFERENT PLACES, THE NOTICE MUST BE GIVEN WITHIN THE FOLLOWING TIMES:

1. If sent by mail, it must be deposited in the post office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.

2. If given otherwise than through the post office, within the time that notice would have been received in due course of mail, if it had been deposited in the post office within the time specified in the last subdivision. (Section 104.)

In cases where the party notifying and the party to be notified reside in different places, the notice if sent by mail must be deposited in time to go on the day following the day of dishonor, or if there is no mail at a convenient hour on that day, by the next mail thereafter. If the only mail left a place at 6

A. M. it would be enough to mail a notice in time to go out at 6 A. M. on the next day but one after the day of dishonor. But it has been held in Wisconsin, and we suppose it is clearly right, that where the daily mail left between 9 and 10 o'clock in the morning, that was a convenient hour, and the notice must be mailed so as to catch that mail on the day following the day of dishonor. The notice may be given otherwise than through the post office, and then the test is whether it is given within the time that notice would have been received in due course by mail if it had been properly sent.

WHEN SENDER DEEMED TO HAVE GIVEN DUE NOTICE.—Where notice of dishonor is duly addressed and deposited in the post office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails. The question may be asked about a telegram. In one respect that would be different from the mail. Telegraphic notice would be all right if it were received in time, but if it were not received in time even though seasonably sent, the telegraph company's misconduct or deficiency would not be at the risk of the party to be notified but of the party attempting to use that means. It is only the mail which the statute provides may be used at the risk of the party to be notified.

WHAT CONSTITUTES DEPOSIT IN THE POST OFFICE AND DELIVERY TO A CARRIER.—Notice is deemed to have been deposited in the post office when deposited in any branch post office or in any letter box under the control of the

post office department. Under the Federal postal regulations it is the duty of a letter carrier not only to deliver letters but to receive them when tendered. Accordingly it may be supposed that delivery to a letter carrier when he is engaged in the course of his business would be in legal effect a deposit in the post office.

SUCCESSIVE NOTICES TO SEVERAL PARTIES.—Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor. When notice is properly given to one party secondarily liable, he has a corresponding length of time to give notice to antecedent parties. This raises rather a curious situation sometimes. Suppose the holder gave prompt notice to the last of four or five indorsers, and also gave notice, but not promptly, to the first indorser; the latter notice is ineffective. But suppose notice had been given by the last indorser to the one before, and so in turn each indorser seasonably notifies the preceding one until finally the first indorser is notified by the second; that is a good notice to the first indorser, although it arrives a week or a fortnight later than the other one which was a bad notice; and under Section 93, that second notice would not only inure to the benefit of the indorser who sent it, but it would inure to the benefit of the holder. There is one method of sending notice to earlier indorsers which was upheld in a case decided in Massachusetts fifty or sixty years ago, but we are not sure whether the method is commonly in

use now; that is, by mailing notices to all the indorsers under one cover to the last indorser, leaving him to forward the notices to the earlier indorsers. Of course, if he does so promptly there is no doubt that such notices are timely (Section 107) and inure to the benefit of the holder, but it was further held in this case to be a proper method of notification, charging all the indorsers, even though the last indorser did not forward the notices to the earlier indorsers. It has been held in New York, however, that this is not a sufficient way of giving notice. It cannot be recommended as a safe practice.

ADDRESS TO WHICH NOTICE SHOULD BE SENT.—Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

1. Either to the post office nearest to his place of residence, or to the post office where he is accustomed to receive his letters; or

2. If he live in one place, and have his place of business in another, notice may be sent to either place; or

3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning.

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section. (Section 108.)

As we have heretofore mentioned, it is sometimes a safer thing to mail a notice of dishonor to

a party secondarily liable than to attempt to deliver it to him personally. In mailing a notice, however, there is sometimes difficulty in knowing to what address the notice should be sent. It is not a bad plan to get parties to negotiable instruments, indorsers and drawers, if you are not perfectly sure of their addresses, to write them below their signatures on the paper. If that is done, notices sent to these addresses will always be sufficient. If you have no such guide you may properly mail a notice to the post office where the party to be notified is accustomed to receive his mail or to the post office nearest to his residence. This post office may be at his place of residence or at his place of business. If his place of residence and place of business are in different places, a notice to either is sufficient. If he is temporarily staying in a place, notice may be sent to that place, and presumably it may also be sent to his regular address, even though he is sojourning somewhere else. And finally, if the notice is actually received in time, it does not make any difference how it was received or how it was sent. A case illustrating the difficulties that may arise and the decision of a court on such a question is this: the notary who was to send the notice inquired of several persons as to the indorser's address. The persons to whom he spoke seemed to know about it. They said they thought that a certain town was the nearest town to the farm where the indorser lived. The letter containing the notice was sent accordingly to that address but that did not happen to be the town where the indorser received his

mail, and the indorser did not receive the notice within a reasonable time. Nevertheless, it was held to be sufficient under the terms of the statute.

WAIVER OF NOTICE.—Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied. Notice of dishonor may be waived just as presentment may be waived. It may be waived before the dishonor of the instrument or it may be waived afterwards. In the latter case, it is exceptional that liability should be incurred. The waiver after dishonor is in effect a mere promise to pay in spite of not having received notice; that is, the so-called waiver is really a promise without consideration, but, nevertheless, it is binding.

WHO IS AFFECTED BY WAIVER.—Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only. Occasionally where the waiver is written in the instrument itself a question arises as to the number of persons to whom it applies. If a waiver is contained in the body of the instrument presumably it applies to all persons who may become secondarily liable. On the other hand, if it is written above the signature of an indorser, it presumably applies to the single indorser only whose name is written underneath. But one might perfectly well write on the back a waiver which would apply to anybody who might indorse, as, for instance, "All indorsers on this instrument waive notice."

WAIVER OF PROTEST—A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor. Protest is used with exact propriety only in regard to presentment by a notary and a notice by him embodying a statement of the dishonor of the instrument, but the word is constantly used by bankers and business men as including broadly the necessary formal steps taken by any holder to establish his rights against parties secondarily liable. The statute gives effect to this understanding of business men.

WHEN NOTICE IS DISPENSED WITH.—Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged. Strictly speaking, not presentment or notice but diligence is what the law requires. If, therefore, the holder has exercised due diligence it makes no difference whether there has in fact been presentment or notice. It must be remembered, however, that the excuses for presentment and for notice are different, and the fact that one is excused does not of itself excuse the other.

WHEN DELAY IN GIVING NOTICE IS EXCUSED.—Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, notice must be given

with reasonable diligence. Notice of dishonor is sometimes excused, even though there is no waiver by the party interested. It may be excused temporarily or it may be excused permanently. It is excused temporarily by any circumstance beyond the holder's control, and not due to his negligence, which makes it impossible to give prompt notice. As soon as the cause for the delay ceases to exist notice must be given. The commonest illustration of this sort of thing is a case in which the holder is unable, after reasonably diligent inquiry, to determine at once the address of the party to be notified. It may take him some time to find an address. If he is reasonably diligent that delay will be excused, but as soon as he can find the address with reasonable diligence, further delay will not be excused.

WHEN NOTICE NEED NOT BE GIVEN TO DRAWER.—Notice of dishonor is not required to be given to the drawer in any of the following cases:

1. Where the drawer and any drawee are the same person.

2. Where the drawee is a fictitious person or a person not having capacity to contract.

3. Where the drawer is the person to whom the instrument is presented for payment.

4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument.

5. Where the drawer has countermanded payment.

WHEN NOTICE NEED NOT BE GIVEN TO

INDORSER.—Notice of dishonor is not required to be given to an indorser in any of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument.

2. Where the indorser is the person to whom the instrument is presented for payment.

3. Where the instrument was made or accepted for his accommodation.

The cases in which notice of dishonor is permanently excused may be summed up thus: where the person to be notified had no right to expect that the maker or drawee of the instrument would pay it, he cannot complain if he receives no notice. There are various illustrations of that stated in this section, and subdivision 4 would cover any case not specially enumerated in the other subdivisions. If the drawer and drawee are the same person, obviously the drawer knows when the drawee refuses to pay, therefore the drawer is not entitled to notice. If the drawee is a fictitious person, or one without capacity to contract, the drawer ought to have known that and ought to have expected that the result would be non-payment of the draft, and therefore cannot expect notice. So, also, where the drawer had no right to draw the instrument, as where he had no funds or no arrangement for payment of the draft, or where he himself had entered into any arrangement with the drawee not to pay the draft, as if he countermanded payment. Similar cases calling for no further comment arise in

regard to an indorser, and are covered in Section 115. There is also the case of either drawer or indorser being the person who really ought to pay the instrument, the signature of the party primarily liable being merely lent for accommodation. (Sections 114, 115.)

NOTICE OF NON-PAYMENT WHERE ACCEPTANCE REFUSED.—Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted. Where the instrument has once been dishonored by non-acceptance, the parties secondarily liable are charged, if notice is given. If an acceptance is subsequently taken by the holder, the parties secondarily liable are again freed, but will once again be made liable if the acceptor fails to pay and notice is properly given of this failure.

EFFECT OF OMISSION TO GIVE NOTICE OF NON-ACCEPTANCE.—An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission. There is one other circumstance besides the fact that paper is overdue which will prevent a purchaser for value without notice from being a holder in due course; that is, knowledge that a bill of exchange has been dishonored by a refusal to accept. On the continent of Europe a bill of exchange is always presented for acceptance as well as for payment by a notary, and if acceptance or payment is refused, the notary marks in ink on the face of the bill that circumstance. Accordingly, anybody can tell,

on the continent of Europe, from the face of a bill of exchange, whether it has been dishonored before maturity. But in this country and in England the bill may have been dishonored by refusal to accept, and a right of action may have accrued against the drawer, and yet, maturity not having come, a purchaser may have bought the instrument in good faith. Such a purchaser will be a holder in due course, although if he had notice of the dishonor for non-acceptance, he would not be a holder in due course, even if he bought before maturity of the bill (see further Section 133), and if a holder in due course he can charge the parties to the bill, even though they have been discharged, so far as a prior holder was concerned, by his failure to give them due notice of the dishonor for non-acceptance.

PROTEST WHEN NECESSARY AND WHEN IT MAY BE DISPENSED WITH.—Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required except in the case of foreign bills of exchange. Protest is the most certain way to prove the facts, showing that secondary parties to a negotiable instrument have been charged; therefore it is frequently desirable even where not legally essential. At common law a protest was required in only one case, that is, on the dishonor of foreign bills. The statute now makes the protest evidence in regard to the dishonor of any negotiable instrument.

CHAPTER X

Protest, Acceptance and Payment For Honor, and Bills In A Set

THE PURPOSE OF PROTEST.—Protest is of very old origin, and the essential purpose of it is to furnish the evidence of a disinterested person that a negotiable instrument has been properly presented and dishonored.

WHEN PROTEST IS NECESSARY.—The Negotiable Instruments Law provides that: "Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary." Protest is often used broadly to signify any dishonor of a negotiable instrument, but, of course, properly it means presentment by a notary, and his certification that an instrument has been presented for payment and has been dishonored. Protest is only necessary in regard to foreign bills. (Section 118.) A foreign bill is one which is drawn in one jurisdiction and payable in another. For this purpose the different States of the Union are foreign to each other. (Section

129.) A bill drawn in New York payable in Boston is as much a foreign bill for this purpose as one drawn in England payable here. Suppose A, living in Idaho, draws a check on his local bank payable to B, who also resides in that State. B deposits the check with his bank, which clears same through its correspondent in a foreign State, and through banking channels the check eventually reaches A's bank and is paid. Is the instrument a foreign bill of exchange? Clearly a check drawn by A in Idaho upon an Idaho bank, payable to B in Idaho, is not a foreign bill of exchange because it has been indorsed by a bank in another State. Section 129 of the Negotiable Instruments Act defines an inland bill as "a bill which is, or on its face purports to be, both drawn and payable within the State. Any other bill is a foreign bill." A check dated in one State upon a bank in another State is a foreign bill. Mankey v. Hoyt, 132 N.W. (S.D.) 230.

WHAT MAY BE PROTESTED.—Though protest is not necessary for any other negotiable instrument, except foreign bills of exchange, including foreign checks, it is convenient frequently to protest other negotiable instruments. The law provides that protest may be made of other negotiable instruments (Section 118), and the certificate of protest is evidence in such cases, as well as in the case of foreign bills of exchange, of the facts which it states, namely, that the instrument has been duly presented and notice given. Statements in a certificate of protest, however, whether of foreign bills or of other instruments, are not conclusive evidence of the facts which they

state. They are some evidence, but it may be shown by other evidence that the instrument was not presented, or was not presented at the time the certificate asserts, or that the notice was not given as therein asserted.

PROTEST; HOW MADE.—The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify (Section 153):

1. The time and place of presentment;

2. The fact that presentment was made, and the manner thereof;

3. The cause or reason for protesting the bill;

4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

ESSENTIAL FACTS MUST BE PUT IN THE PROTEST.—As the purpose of protest is to furnish evidence of the necessary presentment, all facts which are necessary or useful for making out a case against parties secondarily liable, must be put in the protest.

WHO MAY PROTEST PAPER.—Protest may be made by (Section 154):

1. A notary public, or

2. Any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

A notary is, of course, the ordinary person to make a protest, although it is provided that protest may also be made by any respectable resident of the

place where the bill is dishonored, in the presence of two or more credible witnesses. That would perhaps lead to inquiry as to what residents were respectable and what witnesses were credible, and it would be very foolish to take advantage of subdivision 2 of Section 154 except in case of absolute necessity. Moreover, as the section requires, as the common law also required, a seal to be attached to the protest, of which courts, even of another State, would take notice as proving that the paper was what it purported to be, it may be questioned whether the permission given in subdivision 2 of Section 154 would be effective in case of a foreign (that is, interstate) bill.

TIME WHEN PROTEST IS TO BE MADE.—The time of protest is the day of dishonor, unless delay in presentment is excused for reasons which we have previously described. If a bill has been noted for protest, the protest may subsequently be written out as of the day protest was noted, but this must be done exactly. In one case a bill was noted for protest on the 24th of September. The extended protest was dated the 25th of September and contained a statement of the 25th of September as the day of noting. That protest was held invalid.

WHERE PROTEST IS TO BE MADE.—The place of protest is the place where the instrument is dishonored, and that, of course, is normally the place of payment. There is an exception to the rule that a bill must be protested in the place where it is dishonored, namely, when it is drawn payable at the place of business or residence of somebody other than

the drawee, and has been dishonored for non-acceptance. In a case like this it must be protested for non-payment at the place where it is expressed to be payable.

PROTEST FOR BOTH NON-ACCEPTANCE AND NON-PAYMENT.—A bill which has been protested for non-acceptance may be subsequently protested for non-payment. The statute also provides, in Section 150, that where a bill is dishonored for non-acceptance, the bill must be treated as dishonored or the holder will lose the right of recourse against the drawer and indorsers. This obviously means that if a protest for non-acceptance is duly made, the indorsers and drawer are charged once for all. There is no occasion then for presentment for non-payment. Section 150 also would imply that if the instrument is dishonored for non-acceptance, and the holder fails to notify the parties secondarily liable, they are discharged, and in that case, also, there is no use to present for payment afterwards. The only cases, then, that we can think of in view of Section 150, where there could be any possible use in a second presentment are, (1) where the presentment for acceptance was not, for some reason or other, a proper presentment, and (2) where the place of payment is other than the residence or place of business of the drawee. Of course it may be desirable as a matter of business to make a second presentment to see if the drawee will not change his mind.

PROTEST BEFORE MATURITY WHERE ACCEPTOR INSOLVENT.—Where the acceptor

has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers. This provision of the law follows the practice on the continent of Europe. It is not common practice in the United States.

WHEN PROTEST DISPENSED WITH.—Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence. When a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof. The law does not permit the rights of a holder of negotiable paper to be impaired by accidental loss or destruction even though the holder was guilty of negligence. Therefore, to protect the owner of such a bill in his rights against parties secondarily liable, he is allowed to make presentment personally, or (if strict protest by notary is necessary) by means of a copy or merely by a statement of the essential particulars of the instrument.

ACCEPTANCE FOR HONOR.—Where a bill of exchange has been protested for dishonor by non-acceptance, or protested for better security, and is not overdue, any person not being a party already liable

thereon may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for the part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party. The statute contains rather elaborate provisions in regard to acceptance for honor and payment for honor of a bill of exchange. We suppose that is not of very common occurrence. The purpose of it is this: if we make ourselves liable for another person's debt, or if we pay another person's debt, it is not generally true that we have a right of recourse against him. We have no business to pay another person's debt unless we want to free him from liability. But in the case of a bill of exchange which is dishonored, that is not true. An outsider may accept or pay for the honor of any party, generally the drawee, rendering himself liable, or making actual payment, and still have recourse against the drawer. In order to get this recourse against the drawer it is necessary that the bill shall be presented to the drawee for payment and protested, so that the person who accepts or pays for honor has the certificate of the notary to show that he acted only after the drawee of the bill had refused to honor it. The statute is sufficiently self-explanatory of the general subject of acceptance for honor, as the student will find by reading Sections 161-177.

BILLS IN SETS CONSTITUTE ONE BILL. —Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill. Another rather exceptional sort of case relates to bills in a set, and this is provided for in Sections 178 to 183. We call the case exceptional, but, of course, it is common enough in foreign exchange. The reason is not apparent why the practice still persists of drawing such bills in a set, each part of which is an original. We do not know why one original and copies would not serve every useful purpose; but however this may be, it is common practice to draw foreign bills in a set, and each part is as much an original as the others. Whichever one is indorsed first gives to the indorser a perfect title to the whole. If the holder of a bill in three parts should indorse the three parts, the first part to A, then the second to B, and then the third to C, A becomes the owner of the whole bill; he can demand the other parts from B and C. It would not matter if the first indorsed part were numbered the third in the set; A would still be the first man to get an indorsement, and he therefore would become owner of the whole set. In spite of the fact that A is the owner of the whole, if B or C should present his part to the drawee, and the drawee in good faith accepted or paid the part first presented to him, the payment would be a discharge of the bill; but we suppose A, who was the first indorsee, would have a right against the later indorsees, B or C, who got payment from the drawee. A could say to B or C: "That

money which you got really belongs to me, for I was the owner of the bill." Of course, if the holder should do as we have suggested—indorse for value the three parts to different persons—he is committing a fraud. He is liable on his indorsement on every part to whomever may have paid value for that part. The acceptance may be written on any part, but it must be written on only one part. If it is written on more, the acceptor would be liable to a holder of each part on which he had written an acceptance. That is a very sensible provision, and yet we can see no more reason for requiring that acceptance be written on one part only than for requiring that the drawer's name be on one part only. Of course, the practice of drawing bills in sets is unfortunate. The acceptor cannot properly make payment on any part except the one on which his acceptance is written; that is, he must get that part surrendered to him or he will not be discharged. The remaining provisions about bills drawn in a set are explicit enough not to require further explanation. The student should read Sections 179 to 183 of the Negotiable Instruments Law.

CHAPTER XI

The Discharge of Negotiable Instruments

MEANING OF DISCHARGE.—By the "discharge" of a negotiable instrument we understand the extinguishment of all rights of action on the document. It is a kind of absolute defence. Although payment is the usual way to bring about a discharge, there are other well-recognized methods and we find the Negotiable Instruments Law giving the following methods (Section 119):

1. By payment in due course by or on behalf of the principal debtor.
2. By payment in due course by the party accommodated where the instrument is made or accepted for accommodation.
3. By the intentional cancellation thereof by the holder.
4. By any other act which will discharge a simple contract for the payment of money.
5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

PAYMENT.—Payment in due course by the principal debtor discharges a negotiable instrument. "In due course" means at or after maturity. A payment before maturity does not discharge the instrument. That would not be an absolute defence. One who purchased a note before maturity which had in

fact been paid could collect again. Even if the payment is made in due course,—that is, at or after maturity,—it must be made by or on behalf of the principal debtor. A payment by an indorser at or after maturity would not discharge the instrument; the maker, of course, would still be liable on it. But the second paragraph of Section 119 provides that payment in due course by a party accommodated would discharge the instrument; that is, if an instrument were made for the accommodation of an indorser, payment by that indorser would totally discharge the instrument.

CANCELLATION.—A third method of discharge is by the intentional cancellation of the instrument. That may be regarded as the normal way of discharging a negotiable instrument. A negotiable instrument is looked on as a formal thing which exists as an obligation normally as long as it exists uncancelled. Destroying the instrument is destroying the obligation, so that tearing or punching holes in or otherwise cancelling an instrument is the appropriate way of discharging it, and will discharge it even if it is done before maturity. A question has arisen as to the effect of an intended cancellation before maturity, which was not done so effectively as to be ineradicable. There were certain notes of the District of Columbia which were taken up before maturity and stamped as paid with a rubber stamp, but they were not punched or the paper otherwise destroyed or mutilated. Somebody got hold of them, washed off the marks of the rubber stamp and negotiated them

again before maturity. The Supreme Court of the United States held that the notes had been effectively cancelled and could not be enforced, even by a holder in due course. The court, we think, regarded the note as, on the whole not negligently cancelled. It would seem to us that a holder in due course ought to be able to collect on such an instrument if the cancellation were really done so carelessly as to invite alteration by rubbing out the marks of cancellation. To be effectual, cancellation must be intentional. Strictly at common law even unintentional cancellation destroyed the obligation, because the obligation was regarded as identical with the instrument and not able to survive its destruction or mutilation; but courts of equity first compelled the issue of a new instrument when the original was cancelled accidentally, or lost or destroyed accidentally, and now even in a court of common law such an instrument cancelled by mistake or lost or destroyed would still be regarded as imposing an obligation on the parties to it.

ACTS WHICH WOULD DISCHARGE A SIMPLE CONTRACT.—The fourth method of discharge is by any other act which will discharge a simple contract for the payment of money. That is simply a mistake of the statute. Among proposed amendments to the statute is the repeal of this fourth method of discharge. It is a mistake for this reason: in a non-negotiable contract, that is in a simple contract, for the payment of money, any agreement between creditor and debtor for the discharge of the debt, if made for good consideration, will discharge

it. Thus, if the creditor agrees to take a horse in payment of a debt of $100 and the debtor gives the horse, the debt is discharged. But suppose the case of a negotiable note for the payment of money, and an agreement before maturity by the payee to take a horse in full satisfaction. Then suppose the horse was given; that would not discharge the note. An indorsee of the note before maturity, who took the instrument in ignorance of the settlement and paid value, would be able to enforce it under the law, as it was before the Negotiable Instruments Law was enacted, and it is hard to believe that the framers of this statute intended to change in such an essential manner the law of negotiable paper as to alter that rule.

THE HOLDER AT MATURITY THE PRINCIPAL DEBTOR.—A final method of discharge is stated in the same section of the Act, that is, when the principal debtor becomes the holder at or after maturity in his own right. You will see the reason for such a rule. If the maker of a note is the owner of it at maturity, then the duty to pay and the duty to receive payment are united in the same person and they cancel each other. But the maker must be the holder at maturity in his own right. That means if he were the holder as executor or as trustee, while his obligation as maker was his individual personal obligation, the instrument would not be discharged.

WHEN PERSONS SECONDARILY LIABLE ARE DISCHARGED.—We now come to the methods of discharge which will extinguish the several

contracts of the drawer and indorser in their characters of surety. The Negotiable Instruments Law enumerates the following methods of discharging a person secondarily liable: A person secondarily liable on the instrument is discharged (Section 120):

1. By any act which discharges the instrument.

2. By the intentional cancellation of his signature by the holder.

3. By the discharge of a prior party.

4. By a valid tender of payment made by a prior party.

5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved.

6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.

DISCHARGE OF SINGLE OBLIGATIONS ON AN INSTRUMENT.—An instrument may be discharged as to one party without being discharged altogether. Section 49 provides for a case which not infrequently occurs in suits on negotiable instruments. When a man sues on a negotiable instrument he must trace his title from the payee, if it is payable to order, until his own title accrues. Now if there are a series of special indorsements, the holder must prove every one of them,—prove that they were made by the person who purported to make them; but if there

is a blank indorsement, the holder may fill in his name there, and frequently, where there is a special indorsement, subsequent to a blank indorsement, the holder will cross out the special indorsement so as to leave the blank indorsement as the last one; then he can fill in his own name in the blank. But if he does that, the indorser whose name is struck out is discharged; it is a cancellation of his obligation. Accordingly, one wants to be sure before striking out an indorsement in this way that the other parties are sufficiently responsible to make the collection of the instrument certain.

DISCHARGE OF JOINT DEBTOR OR SURETY.—We now come to the troublesome matter of personal defences which must be understood in order to comprehend subdivisions 5 and 6 of Section 120. It presents this question: How far does a discharge or dealings with one party to a negotiable instrument affect the holder's rights against other parties to the instrument? And there are two situations where this question becomes especially important: first, where there are joint obligors, either as makers or as indorsers, and second, where there are parties bearing the relation to one another of principal debtor and surety.

RELEASE OF ONE JOINT DEBTOR RELEASES ALL.—A joint debtor stands in a rather technical relation to his creditor, and it was a rule of the common law that a release of one joint debtor released all. As they could no longer, after the release of one, all be bound jointly, and as that was the only

relation entered into by them, if one was released all in effect were released. Similarly a judgment against one joint debtor discharged all. Accord and satisfaction with one discharged all.

COVENANTS NOT TO SUE.—A covenant not to sue one, however, did not discharge all. A covenant not to sue any debtor is merely a contract with the covenantee that he shall not be sued. The covenantor, the maker of the obligation, therefore, though he would make himself liable in damages might break his contract not to sue, and nevertheless sue. So the result, if a creditor gives a joint debtor a covenant never to sue him, is that the creditor may nevertheless sue him together with the other joint debtors, and the creditor would have to sue all of them at once in order to recover, and it would be no defence that he had covenanted not to sue. The suing creditor could say: "Yes, I promised not to sue and I am breaking my promise, but if that results in any damage to you, you can sue me for breaking my covenant." Some damage to the covenantee might ensue, but it might not cause any substantial damage. The creditor of joint debtors, though he gets, if he succeeds in his action, a joint judgment against all of them, may levy execution on the property of any of the debtors. He does not have to get it equally from all. He can go wholly against one, and the joint debtors will have to settle up among themselves as to what each ought to pay. Accordingly, if the creditor gets a joint judgment against his joint debtors after he has given one of them a covenant not to sue him, no substantial

damage will be caused to that covenantee if the creditor levies execution wholly against the other debtor. This, then, is a summary of the situation as to joint debtors. The holder must not release one of them or make accord and satisfaction, but he may, without losing his right of recovery against the rest, covenant not to sue one. The real effect of such stipulation would be better expressed by calling it a covenant not to levy execution on any judgment against the covenantee, for that is in substance what it amounts to.

DISCHARGE OF SURETY BY DEALING WITH PRINCIPAL.—Now let us take the more troublesome case of the principal debtor and surety. It is a rule of the law, applicable not simply to negotiable paper, but to contracts generally, that a surety may be discharged by several kinds of dealing with the principal debtor. The surety will be discharged, first, by any release of the principal debtor; second, by any change in the nature of the obligation made by agreement with the principal debtor; and third, by any dealing with the collateral put up by the principal debtor in a way not warranted by the original agreement (even though the principal debtor subsequent to the execution of the original agreement may have authorized such dealing with the collateral); or by the refusal to accept a tender of payment by the principal debtor. The reason the surety is discharged in all these cases is broadly that he has agreed to go security for an obligation on certain terms, and it is not fair to him to try to hold him as security when the situation has changed. Of course it has changed

materially if the principal debtor is released, for then the obligation would be thrown wholly on the surety. It is less obvious, perhaps, but still clear, that it is unfair to the surety if any agreement is made with the principal debtor whereby the terms of the obligation are otherwise altered.

GIVING TIME TO THE PRINCIPAL.—The commonest kind of alteration of the terms of the obligation of the principal debtor is by giving him time; that is, extending the time of the maturity of his obligation. Suppose a maker of a note is the principal debtor and an indorser is surety. The note is due on February 1. A contract is made with the maker that he shall have until February 15 to pay that note. That will discharge the indorser. This does not rest on any principle of negotiable paper. It would be the same if instead of a note we had said a bond with a surety, maturing at a certain time, and an agreement was made with the principal debtor to extend the bond for a month. But now in order that this giving of time or any other change in the obligation shall have the effect of which we speak, it is essential that the agreement to give time or to make any other change shall be binding. It must be a binding contract with the principal debtor. If the holder of the note, in the case we have assumed, should merely say to the maker: "You may have until the 15th of February; until then I shall not press you," the indorser would not thereby be discharged, provided that presentment had been made at maturity and notice given according to the rules of negotiable paper. In the case as

we have last put it, the creditor has made no binding contract to hold the obligation open until February 15. The creditor has promised to do so, but there has been no consideration for that promise. If, however, the parties made a bargain by which the maker agreed to pay the interest until February 15 in return for a promise by the holder not to enforce the note until that date, then you would have a binding contract and the surety would be discharged.

DEALING WITH COLLATERAL. — The third way that we have given of discharging a surety, by dealing with collateral, not infrequently arises in dealings with banks. Collateral is put up for an indorsed note, and the maker wants to make a substitution of collateral and is allowed to do so by the bank. Unless there was something in the terms of the original bargain to which the surety was a party which allowed that substitution of collateral, the bank will lose its right against the indorser if it permits the substitution of collateral without the indorser's assent. You will readily see the reason of this when your attention is called to the fact that the surety—the indorser—is as much interested in the sufficiency of the collateral as the bank is. If the collateral is insufficient the surety will have to answer for the consequences. Accordingly, the surety has a right to be consulted if there is any question of substituting different collateral for that which was originally put up with the note. Also, if the principal debtor tenders payment and the creditor refuses to accept it, the creditor cannot thereafter hold the surety.

DIFFERENT WAYS IN WHICH SURETIES ARE LIABLE.—Sureties may be liable either jointly with the principal debtor, or jointly and severally, or severally. Moreover, the surety may or may not obviously be such by the terms of the instrument. On a promissory note with indorsements, the maker is at least apparently the principal debtor, and as to him the indorsers are sureties. Moreover, a party may be a principal debtor with reference to one party, and a surety with reference to another. Thus the first indorser is a principal with reference to the second indorser, but a surety with reference to the maker. But where signatures are for accommodation, it may happen that one who seems to be the principal debtor is really only a surety, or the principal debtor and surety may promise jointly. One of the joint makers of a note may be a surety. If he is, the note may or may not indicate the fact. If the surety and principal debtor are joint obligors you must look out for both the difficulties previously referred to as inherent in the situation of joint debtors, and also for the difficulties always inherent in the relation of principal and surety. These two things must be looked out for separately.

EXPRESS RESERVATION OF RIGHTS.—There is one qualification, however, in regard to what we have said about the effect of a release, either of a joint debtor or of a surety. It is held that by express reservation of the creditor's right against a surety, or against a joint debtor who is not a surety, the creditor may retain his rights. In effect, the instrument, though called a release with reservation of rights, is

treated by the law as though it were merely a covenant not to levy execution on the discharged debtor. Let us see how this works out. If a creditor releases a joint debtor who, we will suppose, is also the principal debtor with reservation of rights against the surety, the creditor must sue both parties if he wants to collect against anybody, but then he will levy execution against the surety. The surety will then sue the principal debtor for indemnification—for a principal debtor is always bound to indemnify a surety who has been compelled to pay—and thus the principal debtor will eventually have to pay the debt. The principal debtor cannot in turn sue the creditor, because the creditor by reserving rights against the surety had bargained for the right to collect from him even if the consequence of so doing involved loss to the principal debtor. The result is that a release with reservation of rights given to a principal debtor does not do him any ultimate good. It saves him from having his property directly seized by his creditor, but as soon as the surety is forced to pay, that surety will then sue the released principal debtor and collect from him. As a practical matter the moral is: if you are releasing any party to a negotiable instrument, or, indeed, to any contract, always insert a reservation of rights against all other parties if you don't mean to discharge the whole instrument. If one simply follows this rule in every case it will be unnecessary to think out in just what cases the release might be fatal and in what case it might not be. Always add, "Reserving, however, all my rights against other parties to the instrument."

CONCEALED SURETYSHIP RELATION.—Now as we have said, the suretyship relation may appear on the face of things or it may not. On the face of a note made by A and indorsed by B, A appears to be the party who is the principal debtor and B appears to be the party who is the surety, but that is not necessarily the fact. That note may have been made by A for the accommodation of B. In that case B is really as between the parties the principal debtor, and A, the maker of the note, is the surety.

GIVING TIME TO SURETY WHO DOES NOT APPEAR TO BE SUCH.—Now what is the effect of a contract by a payee, the holder of the note, to give time to A? Giving time to a surety does not discharge the principal debtor, and if A is in fact the surety, B, the principal debtor, cannot complain if time is given to A. But suppose the holder of the instrument, being ignorant that A was an accommodation maker, and therefore was really a surety, gave time or a covenant not to sue to B, the indorser. In this case, is A discharged? Can A say to the payee who is the holder, "You have given time to B, the indorser, and as he was really the principal debtor, you have changed the form of the obligation; and as I am really a surety, though I seem to be the principal debtor (as I am the maker of the note), I am discharged?" Prior to the passage of the Negotiable Instruments Law the answer to that question depended on this: did the payee or holder actually know when he gave time to B, the indorser, that A was really a surety for B and that B was the principal

debtor? If at any time before making the contract of indulgence, the holder knew that B was really the principal debtor, then an agreement for time made with B would discharge the surety, A, the maker of the note. In other words, the holder had to respect the suretyship relation between the parties as soon as he had notice of it, even though he did not know of it until after he became holder.

EFFECT OF NEGOTIABLE INSTRUMENTS LAW.—Now it has been a disputed question under the Negotiable Instruments Law whether that law has changed this rule, but the view adopted by most States which have had the question before them, is that the Negotiable Instruments Law changed the rule of the common law; that the language of Section 120, which is the section involved, is such as to indicate that the Legislature intended the holder should be bound only to consider who was primarily liable on the instrument, and need take no notice of a suretyship relation not apparent on the face of the instrument. It still remains law, as it was before the Negotiable Instruments Law, that to give time to a principal debtor, who is prior on the instrument to the surety, will discharge the surety; but it is probably not true under the Negotiable Instruments Law, that finding out afterwards that the party subsequent on the instrument is really the principal debtor compels the holder to treat him as such. In any State where the matter has not yet been decided, however, the only safe way would be to assume that the rule of the common law might still prevail, and treat

one who was discovered to be a surety in the same way whether or not he appeared by the instrument to be such.

THE RIGHTS OF THE PARTY WHO DISCHARGES THE INSTRUMENT.—The Negotiable Instruments Law provides that where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except (Section 121):

1. Where it is payable to the order of a third person, and has been paid by the drawer; and
2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

This section only becomes important where the party secondarily liable derives title through the prior parties whom he is endeavoring to hold liable. If, when he is remitted to his original position, he could not hold any prior party liable on the instrument, it is in effect totally discharged.

RENUNCIATION BY HOLDER.—The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation

must be in writing, unless the instrument is delivered up to the person primarily liable thereon. Renunciation is an exceptional kind of personal defence that is not allowed in contracts in general but only in negotiable instruments. A holder of a negotiable instrument may, by simply writing to the maker that he renounces his rights on the note, discharge the maker so far as such holder personally is concerned. The maker will not have an absolute defence against a subsequent holder in due course, but he will have a personal defence against the holder who has thus renounced his rights. This is entirely different from the law governing a simple contract. If a creditor on a simple contract agrees to renounce his rights for any sum less than the face of a liquidated debt, the renunciation or the agreed surrender of the creditor's rights amounts to nothing. The payment of part of the debt is not sufficient consideration for the agreement to surrender the whole debt. Still more plainly is it true that the creditor cannot renounce his claim altogether without getting any payment. There would be no consideration for such an agreement on the part of the creditor. But in the case of a negotiable note, we have just that possibility. The holder may, without getting any consideration, renounce his rights against the party who really ought to pay the note, that is, the maker, unless he made the note for the accommodation of an indorser. In order to be effective, the renunciation must be in writing.

THE UNINTENTIONAL CANCELLATION OF A NEGOTIABLE INSTRUMENT.—A cancel-

lation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument, or any signature thereon, appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally or under a mistake or without authority. The principle involved in this section is the general one that loss or destruction by accident of a negotiable instrument (or any other paper) is not allowed to destroy the rights of the owner of the document. Thus, where it appeared that the date and the signature of the maker of a note were destroyed by burning, the presumption was that the burning was intentional and done for the purpose of cancelling the instrument, and the burden of proving the contrary was on the holder. Jones' Adm'rs. v. Coleman (Va.), 92 S.E. 910.

WHAT IS A MATERIAL ALTERATION.—Any alteration is a material one which changes:

1. The date;
2. The sum payable, either for principal or interest;
3. The time or place of payment;
4. The number or the relations of the parties;
5. The medium or currency in which payment is to be made; or which adds a place of payment where no place of payment is specified, or makes any other change or addition which alters the effect of the instrument in any respect (Section 125).

The cases stated in the subdivisions of this section are necessarily illustrative. The general prin-

ciple is stated in the last part of the section. Other illustrations of material alteration are the erasure of the name of an obligor, the insertion of a waiver of demand and notice, the addition or erasure of a seal in a jurisdiction where seals alter the legal effect of an instrument as by allowing a longer statute of limitation. An alteration is none the less material because the change is advantageous to the obligor. It is material to insert a later day of payment, a lower rate of interest, or a smaller amount. The addition of a collateral guaranty is not material for it does not affect the liability of the principal debtor. The addition, however, of another name as a joint obligor to that of a maker or indorser, is material since it purports to make the liability joint instead of several. Correcting a mistake in spelling or in the initials of a name, or inserting a description of security given for the note, is not material.

THE EFFECT OF A MATERIAL ALTERATION.—Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

GENERAL RULE AS TO ALTERATION.—An absolute defence is created by alteration, with which Sections 124 and 125 of the statute deal. Be-

fore the statute was passed there were two important things to consider: first, was an alteration material, and second, was it fraudulently made by the holder. If an alteration was immaterial, it would have no effect whatever. It therefore became important to decide what was a material alteration. Indeed, it still is important, and the statute in Section 125 states some of the principal alterations which are held material. Many of them, you will readily see, must be material, as, for instance, alteration of the amount, the time or place of payment, the parties, the medium of payment, the date; and it has even been held in England that the number of a note is material, and that a change in that creates a material alteration. Prior to the statute, if an alteration was material the next questions were, was it fraudulent, and was it made by the holder? If it was not made by the holder, or if the holder made it believing that he was really making the instrument express the agreement of the parties, as for instance, if he added to it, "with interest at 5 per cent," thinking to himself "that was what we agreed," such a change prior to the statute would not destroy the instrument. The alterations themselves if not assented to by the parties to be charged would not bind them. The altered instrument would be effective only in its original form, but it would remain a valid instrument just as if it had remained unaltered. The Negotiable Instruments Law has changed that to some extent and substituted a harsher rule. Section 124 provides: "where a negotiable instrument is materially altered without the assent of all parties

liable thereon it is void, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers." If the section stopped there, any material alteration, however innocent, would make the instrument void, even in the hands of a holder in due course, as would all fraudulent material alterations. Section 124, however, further provides: "but when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." It may seem that this would avoid all difficulties, but consider this case: a note is made payable to A; he, without fraud and thinking it was what the parties agreed, adds the words, "with interest at 5 per cent." He does not negotiate the instrument, but holds it till maturity. It would seem that the instrument is absolutely void. The second sentence does not apply, since the instrument has not been negotiated to a holder in due course, and the first sentence of the section says that the altered instrument shall be void. One may suppose a still harsher case: suppose an instrument is altered by a third person not the holder (that sort of case has not infrequently arisen), and suppose, as before, that there is no negotiation of the instrument prior to maturity. It seems under the wording of this statute that that instrument also is void. In other words, the holder of an instrument must at his peril keep it free from material alterations not only by himself but by anybody else, and if it is once altered the only safe thing to do is to sell it as

quickly as he can before maturity to a holder in due course. If he does that, the holder in due course will be able to recover on the instrument according to its original tenor, but if the instrument is held until after maturity there cannot be a holder in due course, since a purchaser after maturity is not so designated, and the original holder himself cannot recover.

RAISED CHECKS.—Perhaps the commonest kind of alteration in bank business is a raised check. If a check is raised and paid by a bank, the bank can recover the excess payment over and above the original amount of the check from the person to whom payment was made. The bank will not be able to charge its customer the full amount which it has paid, since the customer never authorized payment of the larger amount; so it is essential for the bank's protection that it should recover from the person to whom it made payment in excess. Sometimes it can get at this person, but, of course, not infrequently the person to whom payment is made is a rascal and makes good his escape, or else is irresponsible when caught; then the bank would like very much to charge up the full payment to its customer, and though it cannot generally do that, there is one case where it has been urged that the bank ought to be able to do it. These are the facts of a leading case in England: a man was going away from home and he left with his wife a number of signed blank checks. She filled in the amount of one of these very carelessly, so that it was perfectly easy for a fraudulent holder of the check to add other words and figures and so raise the check;

and the bank, having paid it, claimed the right to charge up against its customer the full amount of the raised check because his carelessness had made possible the loss. The bank was in that case given the right to do so, and it seems to us that that decision is right. It has, however, been overruled in England, and in many States of this country is not law. Apparently, in many, if not most States, if we draw a check for $5 and write the word "five" clear over at the right-hand side of the line, close up against the word "dollars," and also write the figure "5" out at some distance to the right of the dollar mark, so that it is perfectly easy for any one to write "one hundred" in front of the word "five" and insert two figures before the figure "5," and the drawee bank should honor such check in its altered form, such bank would not be able to charge that check as $105 against us, though it was deceived into paying that amount. We think that is wrong, but, as we say, we understand it to be the law in many States. The reason given in the cases for that rule is that one is not bound to anticipate crime. With all respect to the law, it seems that is a silly thing to say. A person who draws a check in the way which we have suggested ought to anticipate crime. Why is it that banks and persons who draw large checks commonly adopt stamping devices of one sort or another to fix the amount? It is just because they anticipate the possibility of crime. It seems to us it may be as negligent not to anticipate crime if the door is left wide open for it as not to anticipate any other sort of happening which is likely to follow from care-

less conduct. But we rather wonder, in view of the law, in such States, that drawers of checks are as careful as they are, for apparently the burden is thrown wholly on the bank, and the drawer is allowed to be careless. We should be interested to have a decision made as to whether there is not some limit to the degree of carelessness in which a drawer may indulge. Indeed, we should like a case to come up involving the most extreme carelessness on the part of the drawer, and would be interested to note whether any court would follow out in such an extreme case the principles that have here been criticised.

CHAPTER XII

Bills of Exchange

HISTORY OF BILLS OF EXCHANGE.—The origin of bills of exchange (billet de change) is obscure. It is supposed by some writers that they were used in Rome, although the proof is not clear. What is probably the oldest known bill of exchange was drawn by Barna of Lucca on Bartalo Casini and Company of Pisa, payable to Landuccio Busdraghi and Company of Lucca, in favor of Tancredi Bonaguinta and Company. When freely translated into English, it reads as follows:

"In the name of God, Amen. Bartalo & Company. Barna da Lucha & Co. Greetings! Di Vignone. On November 20, 339, you will please pay against this letter, to Landuccio Busdraghi & Co. of Luca (Landuccio or Busdraghi and the da Luca Co.) 312¾ gold florins, in exchange for 300 gold florins which on this day we have received from Tancredi Bonaguinta & Co., at the rate of 4¼ in their favor, and enter in our account. Issued October 5, 339." The letter is addressed: "Bartalo Casini e compagni in Pisa." It bears also a trade-mark near to which is the word "Prima."

WHAT IS A BILL OF EXCHANGE OR DRAFT?—A "bill of exchange" or "draft" is a written order drawn by one party called the drawer on another party called the drawee for the payment of money to a third party called the payee, the

amount to be charged to the drawer. The terms "draft" and "bill of exchange" are often used in referring to the same thing. When either a "draft" or a "bill of exchange" is referred to in this chapter the remarks made will apply to both. For instance, A owes B $1,000. A has $1,000 owing him by C. So A gives B a bill of exchange which orders C to pay $1,000 to B.

PARTIES TO A DRAFT.—There are always three parties to a draft: (1) the drawer, (2) the drawee, and (3) the payee. Only a drawee may become an acceptor. In the accompanying illustration A is the drawer, C the drawee, and B the payee. The drawer is the person who orders one to pay another. The drawee is the person who is ordered to pay the money. The payee is the person to whom the money is to be paid. In writing a draft it is customary, though not necessary, to place the name of the person who is to pay it—the drawee—in the lower left hand corner. (Checks are a special kind of bill of exchange and are considered in another chapter.) The bill is addressed to the drawee. He may be asked to show his intention to honor the bill—that is, to pay it—and if he does so he becomes an "acceptor." This assent is usually shown by writing his name with the word "Accepted" on the face of the bill.

USES OF DRAFTS IN COMMERCE.—Drafts are much used by business men to collect accounts. For instance, A, living in Minneapolis, owes B, a dealer in Chicago, $500 for goods purchased. If A does not send the money after a certain time, which

is usually specified in the invoice, then B may draw a draft on A for the amount due. It would be in substantially this form:

$500.00 Chicago, Ill. 192

Pay to the order of C

Five hundred ....dollars

and charge to the account of

B

To A

The payee in this case might be a Chicago bank or B might have drawn the draft payable to some bank in Minneapolis. If a Chicago bank were named, that bank would have indorsed the draft to some bank in Minneapolis and sent it there for collection. B may either make the Chicago bank his agent for the collection of the money, or he may send it direct to the Minneapolis bank. In either case the Minneapolis bank, when the draft is received, will send it around to A by one of the clerks whose business it is to look after collections. If A is willing to pay the draft, he writes across its face "Accepted," with the date, and signs his name. Of course, he is not bound to accept it, but after he does accept it he is obliged to pay it when it becomes due. In the case of a "sight" or "demand" draft, acceptance can be shown only by payment. But suppose A had lived in a community which did not boast of a bank. Then B could have sent the draft to the postmaster or some other responsible person for collection. Very small charges are made by banks for collecting bills of exchange. Suppose this was a draft payable in thirty days. B

may not wish to wait so long to get his money. In that case, the bank that he has constituted his agent will, after the draft is accepted, discount it—that is, credit B with the amount of the draft less the interest on it, calculated from the date the draft is discounted to the date the draft is due.

KINDS OF BILLS OF EXCHANGE OR DRAFTS.—We have seen that there are three parties to a bill. A party may make a bill payable to himself and thus, while there will technically be three persons involved, there will actually be but two people—the drawer and the drawee. The drawer in this case is also the payee. Drafts are either "personal drafts" or "bank drafts." Personal drafts are orders drawn on one person by another to pay a third person. Bank drafts are drawn by one bank on another, directing the latter to pay a certain sum of money to a third party. A bank draft is simply an order which one bank draws on another bank. Practically all banks keep funds on deposit in banks in other cities, especially in the larger financial centers. In this way they are able to meet the demands of customers who often wish a form of payment that will be accepted without question. Bank drafts pass practically as cash almost everywhere in the country. Drafts on New York are known as "New York Exchange." Suppose that Kane & Co., of Toledo, wish to send $1,000 to a firm in Buffalo for goods to be shipped immediately. They send to their bank in Toledo a check for the amount, only in place of the payee's name they write the words "New York Draft." Their

bank then proceeds to make out a draft on its New York correspondent, payable to Kane & Co., for $1,000. Kane & Co. indorse the draft, making it payable to the Buffalo firm, and mail it to the latter. By having the draft drawn to themselves, instead of to the Buffalo people, Kane & Co. have an instrument which serves as direct evidence of the transaction, and when indorsed and transferred acts as a voucher. Or Kane & Co., instead of having themselves made the payee, might have had the Buffalo firm made the payee. Bank drafts are much used by business men to send remittances of money from one part of the country to another, and are probably used more for that purpose than any other method of payment. Nearly all banks furnish application blanks for drafts. Drafts are either "sight" or "time." Sight drafts are payable at sight—on demand; time drafts are either payable at a fixed time after sight or after date or after some event which is sure to happen.

BILL NOT AN ASSIGNMENT OF FUNDS IN HANDS OF DRAWEE.—A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same. The fact that a bill must order the drawee to pay unconditionally, of itself indicates that it is not an assignment of a particular fund; if it were it would violate a fundamental principle of the law of negotiable paper requiring an unconditional order, for that means an order to pay irrespective of the existence of any fund.

BILL MAY BE ADDRESSED TO MORE THAN ONE DRAWEE.—A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession. The reason for not allowing several persons to be drawees in the alternative or in succession is that the multiplication of presentments necessary in order to charge the parties secondarily liable would work practical inconvenience. It is true that somewhat similar inconvenience may be caused by drawing on a number of persons jointly, especially if they are not partners, since in that case presentment must be made to each of them, but the allowance of such a bill seems unavoidable.

INLAND AND FOREIGN BILLS OF EXCHANGE.—An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within one State. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill. There are two reasons for distinguishing between inland and foreign bills; the most important reason is that foreign bills must be protested by a notary, whereas no formal protest is necessary in regard to inland bills; the other reason relates to a subject called the conflict of laws. If the law of the jurisdiction where a bill is drawn differs from the law of the jurisdiction where it is payable, it is necessary to decide which law governs the case. In general the law of the place where the bill is drawn governs the nature and character of the obligations assumed by the parties; but the law of

the place where it is payable governs the formalities of presentment, protest, and the necessary diligence to charge persons secondarily liable.

THE EFFECT OF FAILURE TO PROTEST A FOREIGN BILL OF EXCHANGE.—The fatal results of a failure to protest a foreign bill of exchange and a discussion of the many problems involved in foreign bills are so clearly presented in the New York case of Amsinck v. Rogers, 189 N. Y. 252, that we give the facts stated in the opinion of Judge Hiscock. Rogers, Brown & Company were iron merchants doing business in the City of New York and Amsinck & Company were bankers doing business in the same place. The former made a sale of iron to Messrs. A. Herm. Fraenckl Soehne, of Vienna, Austria, and against said sale drew the instrument in question, which reads as follows:

"New York, Jan. 8, 1901.

"Exchange for £2,058-6/8.

"On demand of this original cheque (duplicate unpaid) pay to the order of Rogers, Brown & Company, Twenty-two hundred and fifty-eight pounds 6/8, payable at rate for bankers cheques on London value received and charge the same to account of pig-iron per S.S. Quarnero.

"Rogers, Brown & Co.

"To Mess. A. Herm. Fraenckl Soehne,
"Ruepgasse, Vienna, Austria.
"No. 75."

This bill was drawn and indorsed and transferred to Amsinck in New York. There was delay in the

shipment of the iron, so that when the consignees and drawees of the bill were notified thereof they refused to carry out their purchase thereof unless an allowance was made, and this condition was complied with by Rogers, Brown & Company. January 8, 1901, the bill was forwarded by Amsinck to Vienna for collection, where it was received January 22d. It was presented to the drawees on the same day, but the collecting agent was requested by the latter not to present it at that time because there were certain differences then existing between them and the drawers concerning the iron in question which probably would be adjusted in a short time. The agent thereupon withdrew the bill and it was not protested, and Rogers, Brown & Company were not notified of the presentment and non-payment. January 28, 1901, the bill was again presented by the agent to the drawees, and payment again demanded, when practically the same request was made that presentment be withdrawn, and the same process repeated; there being no protest, and no notification of presentment and non-payment being given to Rogers, Brown & Company. February 12, 1901, the bill was again presented, and payment formally demanded, which was refused, but no protest was made, and no notice given to Rogers, Brown & Company, except that on February 18th Amsinck's London agent, who had been advised of the presentment on February 12th cabled information thereof and of the refusal to pay, and upon the same day Amsinck by letter advised Rogers, Brown & Company thereof. February 21, 1901, in

response to instructions from New York, the bill was presented to the drawees, payment demanded and refused, and protest made, and with what we shall assume to have been proper diligence Amsinck thereafter, and on March 11, 1901, mailed to Rogers, Brown & Company the notice of protest that day received through their agents; Rogers, Brown & Company promptly taking the position that they were discharged for lack of proper protest. As bearing upon the merits of Rogers, Brown & Company's position, it appears that the steamer carrying the iron arrived at Genoa February 20th, and that at that time the iron in question could have been sold at that place by Rogers, Brown & Company at the same price at which it had been sold to the purchasers in Vienna if the bill had been promptly protested. Upon arrival in Austria, the purchasers refused to accept the iron, and it was sold for the sum of $5,738.38 for the benefit of whoever might be concerned, leaving an unpaid balance upon the bill of $4,364.45. The court said: "It is practically conceded by the learned counsel for appellants that if the latter's obligation to cause protest and notice of protest of this bill is to be measured by the laws of New York where it was drawn and transferred by respondents, there has been a failure of necessary steps which prevents a recovery. Recognizing this, he sought, as already suggested, to introduce evidence establishing a different and less rigorous obligation upon the part of the appellants. This evidence was to the general effect that in Austria, where the same was payable, the instrument involved

was not a bill of exchange nor a check, but a 'commercial order' for the payment of money which was negotiable and which might be presented as often as occasion arose, each presentment being legally good as any other and no protest or notice of dishonor to the drawer being required. In connection with the rejection of this testimony, which presents the only questions upon this appeal, appellants' counsel has seemed to argue the proposition, broader than the evidence offered, that the rights of the drawer of a bill of exchange to protest and notice are governed by the laws of the place where the bill is payable, upon the assumption that in this case such view would excuse the omissions complained of by respondents. We shall first discuss this general proposition so urged and, as we believe, shall demonstrate that the weight of authority is that the rights and obligations of the drawer of a bill of exchange are determined and fixed by the law of the place where he draws it, and as in this case transfers it, and that he is discharged by failure to protest the same in accordance with the laws of that place, such failure being due to different laws or customs prevailing in the country where the bill is payable. It is familiar law that the contracts of the different parties to a bill of exchange are independent and carry different obligations. The drawer of such a bill does not contract to pay the money in the foreign place on which it is drawn, but only guarantees its acceptance and payment in that place by the drawee, and agrees, in default of such payment, upon due notice, to reimburse

the holder in principal and damages at the place where he entered into the contract. His contract is regarded as made at the place where the bill is drawn, and as to its form and nature and the obligation and effect thereof is governed by the law of that place in regard to the payee and any subsequent holder. Story on Bills of Exchange, 131, 154. While as to certain details, such as the days of grace, the manner of making the protest and the person by whom protest shall be made, the law or custom of the place where it is payable will govern, the necessity of making a demand and protest and the circumstances under which the same may be required or dispensed with are incidents of the original contract which are governed by the law of the place where the bill is drawn rather than of the place where it is payable. They constitute implied conditions upon which the liability of the drawer is to attach according to the lex loci contractus. These principles have been affirmed and enunciated by so many decisions that it would be out of place to attempt a general review of the latter, and citation may be made simply of the following cases outside of this State: * * * * Since, however, it is contended by the learned counsel for appellants that the views expressed by Story are in direct opposition to the decisions in this State, a somewhat more extended reference will be made to the latter, and with the result, we apprehend, of quite conclusively demonstrating that the current of their authority has been misjudged. In Aymar v. Sheldon, 12 Wend. (N.Y.) 439, a bill of exchange was drawn in the French West Indian

Islands on a mercantile house in Bordeaux, and was indorsed and transferred in the State of New York, action being there brought upon the bill by the indorsees. The material question arising in the case was whether the steps necessary on the part of the holders of the bill to hold the indorsers upon default of the drawees to accept should be determined by the French law or the law of New York, where the indorsement was made, and it was held that while the payee of the bill was bound to present it for acceptance and payment according to the law of France, as it was drawn and payable in French territories, the indorsee stood upon a new and independent contract, the indorsement being equivalent in effect to the drawing of a bill, and that, this indorsement having taken place in New York, the obligation of the indorser and the rights of the indorsee were to be measured by the laws of that State rather than of the place where the bill was payable, and that this being so it was unnecessary to take certain steps in order to hold the indorser, which would have been necessary under the law of the place where the bill was payable. The court said: That the nature and extent of the liabilities of the drawer or indorser are to be determined according to the law of the place where the bill is drawn or indorsement made, has been adjudged both here and in England. * * * * The contract of indorsement was made in this case, and the execution of it contemplated by the parties in this State; and it is, therefore, to be construed according to the laws of New York. The defendants below, by

it, here engage that the drawees will accept and pay the bill on due presentment, or, in case of their default and notice, that they will pay it. All the cases which determine that the nature and extent of the obligation of the drawer are to be ascertained and settled according to the law of the place where the bill is drawn are equally applicable to the indorser; for, in respect to the holder, he is a drawer. * * * * Upon the principle that the rights and obligations of the parties are to be determined by the law of the place to which they had reference in making the contract, there are some steps which the holder must take according to the law of the place on which the bill is drawn. It must be presented for payment when due, having regard to the number of days of grace there, as the drawee is under obligation to pay only according to such calculation; and it is, therefore, to be presumed that the parties had reference to it. So, the protest must be according to the same law, which is not only convenient, but grows out of the necessity of the case. The notice, however, must be given according to the law of the place where the contract of the drawer or indorser, as the case may be, was made, such being an implied condition. * * * * Counsel for appellants especially relies upon two cases to sustain his proposition that the rules laid down by Story have not been adopted in this State. The first of these cases is that of Everett v. Vendryes, 19 N.Y. 436. This was an action by the indorsee against the drawer of a bill of exchange drawn in New Granada upon a corporation having its office in this State. It

was payable to the order of one Jimines, indorsed by him at Cartagena, and was protested for non-acceptance. The answer denied the indorsement of Jimines in general terms. The plaintiffs claimed to be the indorsees according to the legal effect of the bill. The indorsement was not good and sufficient according to the laws of New Granada, but was so according to those of New York. The question, therefore, was whether for the purpose of bringing an action against the drawer of the bill upon non-acceptance by the drawee in New York State the indorsement was to be tested by the laws of New Granada where it was made or by the laws for New York where the bill was payable. It was held that the laws of New York should govern, and Judge Denio, in writing for the court, said: 'I have not been able to find any authority for such a case, but I am of opinion that upon the reason of the thing the laws of this State should be held to control. These laws are to be resorted to in determining the legal meaning and effect and the obligations of the contract. All the cases agree in this. In this case the point to be determined was, whether the plaintiffs were indorsees and entitled to receive the amount of the bill of the drawees. This was to be determined, in the first instance, when the bill was presented for acceptance and payment in New York. The plaintiff's title was written on the bill. The question was, whether it made them indorsees according to the effect of the words of negotiability contained in the bill itself. Those words and the actual indorsement were to be compared, and the legal rules

to be employed in making that comparison, were found in the law merchant of the State of New York; and by those rules the indorsement was precisely such a one as the bill contemplated. Besides, it is reasonable to suppose that, in addressing this bill to the drawees in New York, the defendant contemplated that they would understand the words of negotiability, according to the law of their own country. * * * * When, therefore, he directed the drawees to pay to the order of the payee, he must be intended to contemplate that whatever would be understood in New York to be the payee's order, was the thing which he intended by that expression in the bill.' In other words, it was held that the indorsement was made for the purpose of enabling the indorsee to present and collect the note in New York, and that an indorsement which was effective for that purpose under that law of the State where performance would be sought was sufficient. It does not seem to us that this decision in any way conflicts with those to which we have already referred. It is true that the learned judge commences his opinion with some general observations as to the principles conceived to be applicable in ascertaining the nature and interpretation of a bill of exchange. Such observations, however, constituted nothing more than a dictum, and were not sufficient in our opinion to outweigh the authorities to which we have already referred. The case of Hibernia National Bank v. Lacombe, 84 N.Y. 367, involved consideration of a draft drawn in New Orleans upon New York bankers. The case was dis-

posed of upon the theory that the instrument was a check, which of course was the fact, and the obligations of the drawer of a check, as stated in the opinion, are entirely different from those of the drawer of a bill of exchange. The former undertakes that the drawee will be found at the place where he is described to be and that the sum specified will be paid to the holder when the check is presented, and if not so paid and he is notified he becomes absolutely bound to pay the amount at the place named. In other words, the drawer of a check contracts to pay at the place where the check is payable, instead of, as the drawer of a bill of exchange does, at the place where the instrument is drawn. It is not, therefore, in conflict with our views to hold that the rights of the parties in the case of such a check should be determined by the law of the place of payment; in other words, the place of performance by the drawer. * * * * In the first place, if we have correctly measured the weight of authority, it establishes the proposition that respondents' contract as drawers was to be performed in New York, where the bill was drawn, and, therefore, the rule quoted, if applicable, would lead to the conclusion that demand and protest so far as they were concerned would be governed by the laws of New York. In the second place, the question involved in the Chapman case was not at all akin to that presented here, and we do not believe that the judge there writing intended to approve the rule that as against drawers in New York of a bill of exchange entire omission of protest might be justified by local

customs and usages in a foreign country. We think that he had in mind certain comparatively inconsequential details of the manner and method of making demand and protest, and which, as we have already seen, may be affected by local custom and usage, rather than the entire omission of these important acts. This estimate of what was intended is confirmed by the case of Scudder v. Union Nat. Bank, 91 U. S. 406, 412, which is especially cited as an authority for what was being said. In the latter case it is written: 'The rule is often laid down that the law of the place of performance governs the contract. * * * * For the purposes of payment and the incidents of payment this is a sound proposition. Thus, the bill in question is * * * * In law a sight draft. Whether a sight draft is payable immediately upon presentation or whether days of grace are allowed, and to what extent, is differently held in different States. The law of Missouri, where this draft is payable, determines that question in the present instance. The time, manner and circumstances of presentation for acceptance or protest, the rate of interest when this is not specified in the bill (citations), are points connected with the payment of the bill, and are also instances to illustrate the meaning of the rule, that the place of performance governs the bill.' Thus far we have assumed that the instrument in suit was a bill of exchange, but we have also considered whether the drawer's rights to protest and notice were governed by the laws of Austria as though such laws would govern such an instrument if otherwise applic-

able under the principles which have been discussed. As a matter of fact, however, the appellants would not be benefited if we should hold in this connection that the laws of Austria did control in certain cases for no evidence was received or offered that the drawers of a bill of exchange would not be entitled to the same protest and notice under the laws of that country as under those of New York. Appellants' only excuse for the omission of these steps rests upon the final proposition that this is not a bill of exchange at all nor even a check, but is what is known in Austria as a 'commercial order' for the payment of money of which no protest need be made. Support for this proposition it is said would have been found in the rejected evidence which would have established as the Austrian law that a bill of exchange must be so designated in the body of the instrument itself, and that such designation by mere superscription as was found upon the instrument in suit is not sufficient. Therefore, on a close and final analysis of appellants' argument it is indispensable that they should convince us that their rejected evidence would have established that this was not to be regarded as a bill of exchange but as a commercial order. We shall assume that under the Austrian law it was a commercial order. On the other hand, there is no doubt, and in fact it is not denied by the learned counsel for the appellants, that it was a bill of exchange under the laws of the State of New York. The bill was there drawn and negotiated and transferred to the appellants. The contract of the respondents was executed and con-

summated there, and as we have already seen was to be performed there upon default of the drawees. The law of New York surrounded the parties and the execution of their contract, and in our judgment it would be not only erroneous but highly unreasonable to hold that they contracted with reference to any law other than that of New York, or intended that their contract should be other than that which such law made it—a bill of exchange. The authorities which already have been cited with reference to the contract and rights of the drawer of a bill of exchange are amply sufficient to sustain this view. Lastly, it is suggested that the decision which we are making will impose much trouble and responsibility upon those who are held for the proper demand and protest of paper in foreign countries where commercial laws and usages differ from our own. We do not see much balance of weight in favor of this argument even if it is to be considered. In a case like this there would be no great difficulty in forwarding with the bill instructions for its proper protest such as were finally given. Some such precautions would not be more onerous than would those otherwise imposed upon a party to a New York bill of ascertaining the law of the foreign country where it was payable in order that he might learn in what manner the rights secured to him where his contract was made would be altered and perhaps materially impaired."

WHEN BILL MAY BE TREATED AS PROMISSORY NOTE.—Where in a bill drawer and drawee are the same person, or where the drawee is a

fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note. The reason for this rule is that in the cases supposed, the drawer in legal effect is absolutely bound to pay, whereas the drawer of an ordinary bill of exchange is only bound to pay on condition that some one else fails to pay on presentment at maturity.

REFEREE IN CASE OF NEED.—Although the Negotiable Instruments Law makes provision for a "referee in case of need," this provision is rarely inserted in bills in this country. When this practice is followed, however, the drawer of a bill and any indorser may insert the name of a person to whom the holder may resort in case of need, that is to say in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may see fit.

THE RIGHT OF THE HOLDER OF A BILL TO DEMAND AN ACCEPTANCE AND HOW IT IS MADE.—The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill and, if such request is refused, may treat the bill as dishonored. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money. It was formerly held that an oral acceptance was binding. But the

bill, as any negotiable instrument, to be most useful in the commercial world, should have the whole contract within the four corners of the paper, although, as we shall see later, an acceptance may be valid though not written on the face of the bill. The holder of the instrument may require that it shall be so written, and, if this request is refused, may treat the bill as dishonored. It is important for a holder to exercise this right and not to rest satisfied with an acceptance which is not written on the bill. Certain principles which we have already discussed in the chapter on Form and Interpretation will readily be seen to be applicable here. Thus an acceptance to pay "half in money and half in tobacco" would be bad. As a negotiable instrument must be payable in money, so the acceptance must be in money only. Again, an acceptance reading "accepted if the Republicans win the next Congressional election" would be bad, as a conditional acceptance is not good.

ACCEPTANCE BY SEPARATE INSTRUMENT.—Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value. It is to be observed that though an acceptance not written on the bill is in some cases a valid acceptance, it must be in writing. What is such a promise in writing as to amount to an acceptance may give rise to question; especially whether a telegraphic promise is an acceptance in writing. The promisor ordinarily writes the message but delivers this writing to the

telegraph company, which gives another writing to the promisee. It is probable that this is sufficient to satisfy the statute; but a promise over the telephone is insufficient; the common practice of inquiring over the telephone whether a draft or check will be paid is frequently convenient, but it must be remembered that the practice is not protected by the Negotiable Instruments Law, and a promise so made is not an acceptance within the meaning of the statute, though under some circumstances it may amount to a simple contract.

WHEN A PROMISE TO ACCEPT IS DEEMED EQUIVALENT TO AN ACCEPTANCE.—The Negotiable Instruments Act provides that an unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who upon the faith thereof, receives the bill for value. This rule stated in Section 135 was established in the United States as matter of common law prior to the passage of the Negotiable Instruments Law. It is, nevertheless, contrary to the custom of merchants which requires the obligations of negotiable paper to be written on the paper itself, and is opposed to the English law. Such a right as is here alluded to would seem on principle to constitute at most a simple contract. The law, however, is settled in the United States by the statute that such a promise becomes negotiable when the bill is drawn and it is treated as if it were part of the bill. Commenting on this, Professor Brannan says: "It is to be regretted that the commissioners did not take the

opportunity to abrogate the rule, which had grown up in the courts of this country, and which had been made statutory in some of the states, by which collateral written acceptances of existing bills or collateral written promises to accept bills, not yet drawn, are treated as actual acceptances in favor of purchasers who take such bills on the faith of such collateral papers. Under this rule a drawee may be an acceptor as to one holder and not as to another. One who takes such a bill in ignorance of the collateral paper must either get an acceptance from the drawee in order to hold him or must get an assignment of the cause of action of a holder, who did take the bill on the faith of the collateral acceptance or promise. Again, suppose a holder, who knew nothing of this collateral paper should present the bill for acceptance and require that an acceptance be written on the bill and the drawee should refuse. Under Section 133 the holder may treat the bill as dishonored. In such case may he sue the drawer and indorsers at once, as would ordinarily be his right and indeed his only cause of action? He would, under the English law and under our law (unlike the continental law), not have the right to wait until maturity, then present the bill for payment, and in case of refusal, sue for non-payment. And the statute of limitations would begin to run from the refusal to accept as required. Again could such holder recover, as upon dishonor by non-acceptance from indorsers who had taken the bill on the faith of the collateral and as to whom the bill was an accepted bill and therefore not

dishonored? The truth is that our courts have simply confused acceptances with promises to accept or collateral promises to pay a bill, which give rise to a right of action for damages in favor of the promisee in case of failure to perform, but do not give a right of action on the bill and are not negotiable.

"No instrument is adapted to circulation, as negotiable, unless it contains within its four corners the information necessary to determine the liability of all the parties to it, and a negotiable bill ought to carry on its face the information which will enable the reader to know whether it has been accepted or not. Such was the English law as to inland bills since the Statute of 1 & 2 Geo. IV, c. 78, sec. 2 (1821) and as to both inland and foreign bills since the statute of 19 & 20 Vict., c. 57, sec. 6 (1856) and is now the English law by the Bills of Exchange Act.

"There is still another objection to section 134. No good reason is apparent why sight of the collateral paper should be required in case of an existing bill in order that a purchaser should be able to hold the drawee, as an acceptor and not in the case of the purchaser of a bill drawn after the promise to accept. And since the Court of Appeals of New York, construing the corresponding sections of the old act from which these sections of the Negotiable Instruments Law are copied, held, that there is no reason for the distinction, that the difference in phraseology was accidental and that it is enough if the taker of the bill in either case was told or knew otherwise of the collateral paper, there was still less reason for inserting

the words 'to whom it is shown' in Section 134.

"Section 135 perpetuates a rule which has given rise to conflict and must continue to do so and therefore prevent uniformity. Courts have disagreed upon the question as to how minutely the bill must be described in the collateral paper in order to constitute an acceptance in favor of one taking the subsequently drawn bill on the faith thereof, and there is nothing in Section 135 to prevent the continuance of this difference of opinion."

TIME ALLOWED TO DRAWEE TO ACCEPT.—The drawee is allowed twenty-four hours after presentment, in which to decide whether or not he will accept the bill; but the acceptance if given, dates as of the day of presentation. The time thus allowed the drawee is presumably a privilege allowed him which he need not necessarily take; that is, if he should refuse to accept at the beginning of the twenty-four hours, the instrument is immediately dishonored; the holder need not wait the remainder of the period to see if the drawee will change his mind.

LIABILITY OF DRAWEE RETAINING OR DESTROYING BILL.—Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

ACCEPTANCE BY RETAINING THE BILL. —The case referred to in Section 137 might be properly treated as a case of dishonor for non-acceptance,

rather than as a case of acceptance. In the event that the acceptor takes twenty-four hours, or takes the matter under consideration, as the preceding section permits, it is provided that his failure to return the instrument, either with or without his acceptance, at the expiration of the twenty-four hours amounts to an acceptance. It would seem that it rather amounts to a wrongful confiscation of another person's property, but the statute says that it is an acceptance. That means that there must be a demand at maturity for payment of the instrument, in order to charge the drawer or indorsers. This is a section of the statute to which an amendment has been proposed. It would seem reasonable when a drawee thus retains a bill of exchange and refuses to give it back to treat the bill as dishonored rather than accepted, for the drawer ought to be notified of the situation. Of course, the case is one that does not very often occur. Again, this section causes the Negotiable Instruments Law to be contradictory. In the sections we have just been discussing it is laid down unqualifiedly that an acceptance must be in writing. This section follows immediately and provides a form of acceptance that is not in writing. As the Act is drawn, would it not be more accurate to say that there are two kinds of acceptance —written and constructive, the latter term being descriptive of the kind of acceptance we are considering?

CASES ON ACCEPTANCE.—Suppose while the bill is left with the drawee for acceptance, he has some old insurance policies which he considers worthless and only in the way, so he throws them in an

open fireplace where they are immediately burned. It then occurs to him that the draft was with the policies and it has been burned with them. Is this an acceptance? Literally it would be, for the Negotiable Instruments Law reads "where a drawee to whom a bill is delivered for acceptance destroys the same * * * he will be deemed to have accepted the same." Clearly, he has destroyed the bill, although it is apparent he did not intend to. We must read into the section the word "wrongfully" before the word "destroys" to interpret this section properly. Although it is not often that the courts will do this in construing a statute, yet the courts in New York and other States have done it on the theory that this is the clear intention of the legislature in passing the law. Thus in commenting on the expression "or refuses within twenty-four hours" which follows just after the expression we are illustrating, the New York court in Matteson v. Moulton 11 Hun. (N. Y.) 268, said: "The refusal mentioned in the statute, as it seems to us, refers to something of a tortious character, implying an unauthorized conversion of the bill." So, in our illustration, it is true that the burning of the bill with the policies would not constitute an acceptance. The burning was not wrongful or tortious. (Section 137.)

ACCEPTANCE OF INCOMPLETE BILL.—A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-

acceptance and the drawee subsequently accepts it, the holder in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment. In connection with this section the rules previously considered in regard to filling blanks in an incomplete instrument must be borne in mind. The second sentence in Section 138 expresses an obvious truth. An immediate right of action arises on the original dishonor by non-acceptance; and thereafter the drawee has no right to accept at all unless the holder allows him to. Accordingly, the holder may insist on any terms he sees fit as a condition of permitting the drawee to accept subsequently. In connection with this point Section 150 must be borne in mind also. The drawer and any indorsers will be discharged unless the holder treats the instrument as dishonored by the original non-acceptance.

KINDS OF ACCEPTANCE, GENERAL AND QUALIFIED.—An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere. Strictly speaking, a qualified acceptance is no acceptance at all. It is a refusal to accept though unaccompanied by a promise to do something different from that which the drawer ordered. In the case of such an acceptance as is referred to in Section 140, must

the holder present the instrument at the place named in the acceptance, or at the place where the instrument is due according to the tenor of the face of the instrument? Unless the acceptance expressly states that the bill is to be paid only at the place named in the acceptance, presentment must be at the place indicated by the drawing. The acceptor himself could not object to presentment at the place named by him, but parties secondarily liable could assert that the bill was not dishonored unless presented at the place where the drawer ordered payment to be made. The effect of the section is that a place inserted in the acceptance is regarded as merely permissive so far as the acceptor is concerned. If the words were construed as meaning more than this, the acceptance would be a qualified one and therefore would be a dishonor of the instrument.

THE VARIOUS FORMS OF QUALIFIED ACCEPTANCE AND THEIR EFFECT ON THE LIABILITY OF THE DRAWER AND INDORSERS.—An acceptance is qualified, which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated.

2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn.

3. Local, that is to say, an acceptance to pay only at a particular place.

4. Qualified as to time.

5. The acceptance of some one or more of the drawees, but not of all. (Section 141.)

A qualified acceptance of an instrument since it involves a refusal to honor the bill according to its tenor is a dishonor of the bill. Therefore, the holder may refuse to take such an acceptance, and if he does not obtain an unqualified acceptance, may treat the bill as dishonored by non-acceptance, with the ordinary consequences. Therefore, also, where a qualified acceptance is taken the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. But when the drawer or an indorser receives notice of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto. In a suit in which the defendant signed an instrument reading as follows: "Rec'd from Milwaukee Co. an order from F. Anderson to pay their note of $400, as soon as proceeds of sale of hardware is available which I will do," it was held by the Kansas court in the case of Milwaukee Corrugating Co. v. Traylor, 95 Kan. 562, 148 Pac. 653, to be a qualified or conditional acceptance. It will be noted that when a qualified acceptance is taken and the drawer or indorser receives notice, he is deemed to assent unless he expresses disapproval. This is contrary to the general rule in contracts that silence does not give consent. It is elementary that if I write to X that I have a horse to sell, naming it, and putting the price at one hundred dollars, and add that if I do not hear from X by the next Monday I will consider the horse his, that there is no contract

although he does not reply. It may be a convenient way to remember this section simply to bear in mind that it is not in keeping with the general contract principle that silence does not give consent.

WHEN PRESENTMENT FOR ACCEPTANCE MUST BE MADE.—Presentment for acceptance must be made:

1. Where the bill is payable after sight, or in any other case, where presentment for acceptance is necessary in order to fix the maturity of the instrument; or

2. Where the bill expressly stipulates that it shall be presented for acceptance; or

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee. (Section 143.)

In no other case is presentment for acceptance necessary in order to render any party to the bill liable. Presentment is of two sorts: presentment for acceptance and presentment for payment. Presentment for acceptance is only appropriate for bills of exchange and is not generally necessary, though the holder of a time bill is entitled to demand that acceptance be made in writing on the bill and signed. In some specific cases provided for in Section 143, presentment for acceptance must be made. The only one of these cases in which you might not know without being told that the rule was so is the last named, requiring presentment for acceptance where the bill is payable elsewhere than at the residence or place of business of the drawee. If a bill does not require presentment for

acceptance the holder may do just as he chooses about it. If he does present the bill for acceptance and it is dishonored he must give notice of dishonor in the same way as if it had been presented for payment and dishonored, in order to hold the indorsers. He cannot charge the indorsers, if he has so presented it for acceptance and it has been dishonored, by holding it until maturity and presenting it again, and on refusal by the payee giving prompt notice to the drawer and indorsers. (Section 150.) Nevertheless, a holder in due course of such an instrument can charge the drawer and indorsers, although the instrument had been dishonored for non-acceptance before this holder took the instrument, and though the drawer and indorsers had no notice of the dishonor.

WHEN FAILURE TO PRESENT RELEASES DRAWER AND INDORSER.—Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fails to do so, the drawer and all indorsers are discharged. (Section 144.)

If the bill is of a sort which requires presentment for acceptance, the holder must either negotiate it within a reasonable time or he must present it for acceptance within a reasonable time. Suppose the case of a bill payable somewhere else than at the residence or place of business of the drawee and payable in three months. The holder must promptly present it for acceptance or negotiate it. Suppose that

he does present it within a reasonable time and acceptance is refused. Thereafter, having waited more than a reasonable time, suppose that he negotiates it for value to a purchaser who knows nothing of the prior presentment. Probably that purchaser would not be protected, and could not sue the drawer and indorsers because he would have notice from the form of the instrument that there must either have been presentment and dishonor or that the holder has carelessly failed to make presentment within the proper time for acceptance. If presentment for acceptance is made of bills where it is not required by statute, it may be made at any time the holder likes before maturity.

HOW PRESENTMENT IS MADE.—Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and:

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only.

2. Where the drawee is dead, presentment may be made to his personal representative.

3. Where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee. (Section 145.)

Presentment must be made at a reasonable time

of any business day, but one may hold a bill thinking he will not present it for acceptance, and finally change his mind and present it for acceptance shortly before maturity. It may be presented on Saturday prior to twelve o'clock.

TO WHOM PRESENTMENT FOR ACCEPTANCE MUST BE MADE AND ON WHAT DAYS.—If the instrument is addressed to more than one drawee it must be presented to all of them unless they are partners. If the drawee of a bill is dead, presentment must be made to his personal representatives. If he has been adjudicated a bankrupt it must be presented either to him or to his trustee in bankruptcy. A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of Sections 72 and 85 of this Act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock, noon, on that day.

WHERE THE TIME FOR PRESENTMENT IS INSUFFICIENT.—Where the holder of a bill, drawn payable elsewhere than at the place of business or the residence of the drawee, has not time with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawers and indorsers. Here again we see that what the law requires is reasonable diligence, not any particular result, in order to charge parties secondarily liable.

WHEN PRESENTMENT IS EXCUSED.—Presentment for acceptance is excused, and a bill may be treated as dishonored by non-acceptance, in either of the following cases:

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill.

2. Where, after the exercise of reasonable diligence, presentment cannot be made.

3. Where, although presentment has been irregular, acceptance has been refused on some other ground. (Section 148.)

Subdivision 2 of this section covers all cases except that in subdivision 3. The principle expressed in the latter subdivision is of general application in the law of contracts. Where a party to a contract repudiates his obligation, it is unnecessary to comply with the conditions which qualify his obligation. The law does not compel a man to do useless things, and if a party to a negotiable instrument or to any contract announces that he is not going to perform his duty, performance from the other side is excused.

WHEN A BILL IS DISHONORED BY NON-ACCEPTANCE; THE DUTY OF THE HOLDER WHERE THE BILL IS NOT ACCEPTED.—A bill is dishonored by non-acceptance (Section 149):

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or

2. When presentment for acceptance is excused, and the bill is not accepted.

Under this section, where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

Though a holder, as provided in Section 150, must give prompt notice of dishonor by non-acceptance, or he will discharge the drawer and indorser, a holder in due course may (being ignorant of the non-acceptance and taking before maturity) present the bill for payment, and on dishonor for non-payment charge the drawer and indorsers. This is impossible if any notation on the bill itself indicates its dishonor for non-acceptance, since any one who took such an instrument would be chargeable with notice of what appeared on its face.

RIGHTS OF HOLDER WHERE BILL NOT ACCEPTED.—When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary. When there is dishonor for non-acceptance and notice thereof is duly given to the drawer and indorsers, there is an immediate right against them to recover the full amount of the bill. In the case of a non-interest bearing bill it is a clear profit to the holder to have the bill dishonored for non-acceptance rather than for non-payment. There is no discount of interest for the period between the day of maturity and the day when presentment for acceptance was made.

CHAPTER XIII

Checks

CHECK DEFINED.—A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check. (Section 185.)

THE LIABILITY OF A DRAWER OF A CHECK.—As a check is payable on demand it does not contemplate acceptance, though certification of the check corresponds to acceptance and imposes the liability of an acceptor on the certifying bank. There are three differences of special importance between the obligation of the drawer of a check and the obligation of the drawer of any other kind of demand bill. In the first place, by giving a check the drawer represents that he has funds. If we draw a bill of exchange, which is not a check, on some one and give it to a person who pays value for it, we are not guilty of false representations merely because we have no right to draw on the drawee and he refuses to pay the draft and is under no duty to pay it. We are liable for breach of promise on our signature as drawer, that is all; but one who draws a check and passes it, represents that he has funds in the bank and accordingly he is guilty of fraud and misrepresentation, and is not simply breaking a promise if the check is not paid for lack of funds.

CRIMINAL LIABILITY FOR ISSUING BAD CHECKS.—A statute recommended by the American Bankers Association to punish the giving of checks or drafts without sufficient funds in bank, and making the issue of the insufficient check prima facie evidence of intent to defraud, has been passed in nearly all the States, with various modifications. Its effect is weakened in some States where payment within ten days relieves the drawer. It is not criminal to issue a postdated check, subsequently refused because of insufficient funds. The statute which punishes the issue of checks without funds does not apply to a postdated check. Section 12 of the Negotiable Instruments Act expressly provides that: "The instrument is not invalid for the reason only that it is antedated or postdated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery." A postdated check is presentable and payable on the day of its date or for a reasonable time thereafter, and if it is not paid when presented because of insufficient funds, the holder should have the same protested and due notice of dishonor given, and can bring action against the drawer and prior parties for the amount of the check and protest fees. See Smith v. State, 226 S. W. (Ark.) 531.

UNDER WHAT CIRCUMSTANCES A FAILURE TO PRESENT A CHECK WITHIN A REASONABLE TIME WILL DISCHARGE THE DRAWER.—A check must be presented for payment

within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. The second difference between checks and ordinary bills of exchange relates to the effect of using insufficient diligence to charge the drawer. In order to charge the drawer of a bill the instrument must be presented at maturity if it is a demand bill; and on being so presented, notice must be given promptly to the drawer if the instrument is dishonored. If such presentment is not made or such notice is not given, the drawer of a bill is absolutely discharged. But Section 186 provides that a check must be presented for payment within a reasonable time after its issue (that is, like any bill) or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. Those last words lay down an entirely different rule from that applicable in case of a bill of exchange which is not a check. The drawer of such a bill of exchange would be absolutely discharged. The drawer of a check is not discharged except to the extent of the loss caused by the delay, and usually, unless the drawee bank fails, there will be no loss caused by the delay. This section of the Negotiable Instruments Law says nothing about what the effect would be of a failure to give prompt notice to the drawer in case a check was dishonored. As the statute does say (Section 185) that the rule as to checks is the same as the rule governing bills of exchange in all matters not specifically stated, the effect of the statute seems to be that though delay in presenting a check dis-

charges the drawer only to the extent he was injured, delay in notifying the drawer of the dishonor of the check absolutely discharges him, just as it does the drawer of an ordinary bill of exchange. Probably this is a mistake in the Negotiable Instruments Law. The law, before the statute was adopted, was settled that, in the case of checks, the delay in giving notice of dishonor was no more serious than delay in making presentment.

ILLUSTRATION OF WHEN CHECKS BECOME STALE.—When does a check become stale, and what are the duties of a bank respecting payment of stale checks? There is a dearth of authority upon this question. In Merchants & Planters Bank v. Clifton Mfg. Co., 56 S. C. 320, it was held that a check drawn on Christmas Eve, "at the beginning of the season when business is suspended for a greater or less period everywhere," does not become stale in six days so as to put the bank upon inquiry when the check is presented at the end of that period. It is, however, customary for banks to pay checks without inquiry though presented a much longer period after date. In Lancaster Bank v. Woodward, 18 Pa. St. 357, where a bank paid a check more than a year after its date at a time when the drawer's deposit was not sufficient and it appeared that the drawer had in the meantime paid the debt for which the check was given, it was held that the bank could not recover in an action against the drawer for the overdraft. It is said (Daniel on Negotiable Instruments) that "the certain age at which a check may be said to be stale is as

uncertain as the fixing of a day on which a young lady becomes an old maid." The same question arises as to the period of time when the check becomes stale or overdue so as to subject a purchaser thereafter taking to equities. The Supreme Court of the United States held that negotiation six months after date did not subject the holder to equities of the drawer against the payee. Bull v. Bank of Kasson, 123 U. S. 105.

CERTIFICATION OF A CHECK—THE EFFECT WHERE BY THE DRAWER OR BY THE HOLDER.—Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance. Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon. The third difference between the drawer of a check and the drawer of an ordinary bill of exchange is stated in Sections 187 and 188. Certification of a check corresponds in the main to an acceptance of the bill, as has been said, but if the acceptor of an ordinary bill fails to pay at maturity, the holder can notify the drawer and charge him. In the case of certification of a check, however, a distinction is made. If the certification is obtained by the drawer of the check before delivery to the payee, the situation is just the same as in the case of an accepted bill of exchange. The holder, if he does not get his money from the certifying bank, can sue the drawer of the check; but if the holder of a check himself gets it certified, he thereby discharges the drawer. The rea-

son for the distinction is this: a check is an instrument payable on demand, and the normal thing for the holder of a check to do is to get his money. If he goes to a bank and asks for a certification he is not doing the normal thing, and it would not be fair to allow him to extend the liability of the drawer by keeping the check outstanding when he might have got his money instead of the certification when he presented the check. With the exception of those three differences the liability of the drawer of a check is the same as that of a drawer of a bill.

THE DIFFERENCE BETWEEN CERTIFICATION BY THE HOLDER AND CERTIFICATION BY A DRAWER.—This question has recently been discussed by the Court of Errors and Appeals in New Jersey in the case of Times Square Automobile Company v. Rutherford National Bank, 77 N. J. Law 649. The facts in the case were: "One Purdy, being desirous of purchasing a second-hand automobile, employed Millard Ashton, an automobile salesman, to assist him in making a proper selection. Ashton took him to the salesroom of the Times Square Automobile Company, and, after looking over its stock, Purdy, with Ashton's approval, selected a car, the price of which was $600 and gave his check on the Rutherford National Bank for the purchase price. The check was drawn to the order of Ashton, who indorsed it and delivered it to the manager of the automobile company. Immediately after receiving it, the automobile company sent it by special messenger to the banking house of the Rutherford National Bank with a re-

quest that it be certified. This request was complied with. Afterward, when the check was presented for payment, the bank refused to honor it, upon the ground that it had received instructions from Purdy not to pay it. The automobile company thereupon brought suit against the bank on its contract of certification. The defendant admitted that it had certified the check, and that it did so at the request of the plaintiff, the holder thereof, but sought to justify its refusal to pay upon the ground that Purdy had been induced to purchase the car by false representations made by the manager of the plaintiff as to its condition and value. It was contended on behalf of the plaintiff that this defense was not open to the defendant. * * * * The effect of the certification of a check by the bank upon which it is drawn depends upon whether it is done at the request of the drawer or of the holder. When a check is presented by the drawer for certification, the bank knows that it has not yet been negotiated, and that the drawer wishes the obligation of the bank to pay it to the holder, when it is negotiated, in addition to his own obligation. A certification under such circumstances does not operate to discharge the drawer * * * and so long as the drawer remains undischarged, such a defense as that set up in the present case is open both to him and to the bank. But when the certification by the bank is done at the request of the holder, the effect is radically different. The transaction, then, is virtually this: The bank says: 'That check is good; we have the money of the drawer ready to pay it; we

will pay it now if you will receive it.' The holder says: 'No, I will not take the money now, you may retain it for me until the check is presented for payment.' The bank replies: 'Very well, we will do so.' * * * The result is to discharge the drawer from any further liability on the check, * * * and to substitute a new contract between the holder and the bank by the terms of which the money called for by the check is transferred from the account of the drawer to the account of the holder. In contemplation of law the obligation of the bank to the holder, when the certification is at his request, is the same as if the funds had been actually paid out by the bank to him, by him redeposited to his own credit, and a certificate of deposit issued to him therefor. * * * The defendant, in refusing payment of Purdy's check, apparently considered that its obligation to the holder was no greater than if its certification had been made at Purdy's request. It failed to realize that its act operated as a payment of the check, so far as Purdy was concerned, and transferred the moneys which it called for to the account of the plaintiff. The situation was the same, so far as the defendant was concerned, as if Purdy had paid cash to the plaintiff for the car which he had purchased, and the plaintiff had then deposited the cash in the defendant's bank. Having accepted the plaintiff's money, and issued to him a certificate of deposit therefor, it did not concern the defendant from whom, or how, or under what circumstances the money had been obtained. Its contract required it to pay the amount of the deposit to

the plaintiff, or its order, and it could not avoid its obligation to do so by showing that the plaintiff had fraudulently obtained the money which it had deposited with the defendant." Not all States agree with this decision.

PAYMENT OR CERTIFICATION OF A CHECK AFTER BANKING HOURS.—It occasionally happens that a bank will be asked to pay or certify a check after or before regular banking hours. May a bank do this without incurring any risk? In Butler v. Broadway Savings Institution, 157 N. Y. Suppl. 532, the facts were: A savings bank has a by-law which provides that the bank should be open for business daily between 10 a.m and 3 p.m. A check was presented to the bank for payment at 9:30 in the morning and the bank honored the check. At 9:40 on the same morning the depositor arrived for the purpose of stopping payment on this check. The court said: "The rule quoted does not expressly prohibit the payment of a draft without the fixed hours. The rule is merely a regulation for the convenience of the bank." Although there is little other authority on this point it is probably true that a bank is justified in either paying or certifying a check outside of the regular banking hours.

PAYMENT BY THE BANK UNDER AN UNAUTHORIZED INDORSEMENT BY AN AGENT.—Suppose a customer gives his check drawn payable to a company to the company's agent who had it certified at the bank before it is indorsed.

After it is certified the agent indorses the company's name and then, his own name individually, John Jones, then indorses the check and it is cashed for the agent by a bank where John Jones has a personal account, the bank relying upon John Jones' indorsement. The check is paid by the drawee's bank but the company never receives the money, the agent getting it himself. In such a case the payment by the bank of the check upon the unauthorized indorsement makes the bank which paid it liable to the certifying bank. The agent's indorsement if without authority, does not, of course, bind the principal. Goshen National Bank v. Bingham 118 N. Y. 349.

THE RIGHT OF A CERTIFYING BANK TO CHARGE A CUSTOMER'S ACCOUNT IMMEDIATELY.—Suppose a bank certifies a check payable to a distant person at the request of the holder who happens to be a traveling salesman. The depositor was ignorant of this fact and believed that the check would not be presented for payment for several days and accordingly drew a second check, which overdrew his account because of the certification. He cannot recover from the bank for not honoring his second check since it has been held that the bank has immediate right to charge a certified check to the customer's account.

A BANK OFFICER'S RIGHT TO BIND A BANK WHEN HE IS AWAY FROM ITS OFFICE.—Suppose a depositor meets the president or cashier of a bank on a railroad station platform. The depositor states that he is going to the next town to

bid at a real estate auction and that he may need some available funds at once, he has a check book with him and draws a check to his own order and asks the bank president to certify it. As an accommodation, the president honors his request. Is a bank bound by a certification under such circumstances? It has been held that certification of a customer's check away from the bank is improper and invalid. There can be little doubt about the soundness of this, for there is no way for the officer to know that the funds have not been drawn out while he has been away from the bank.

ALTERATION OF DATE OF CERTIFIED CHECK.—A depositor of a bank gave a check payable to bearer, dated in January, 1919, which was presented for certification bearing such date. After check had been certified, the drawer gave a stop-payment order on check. When the check was presented through the clearings, the date " '19," designating the year, had a line through it, and " '20" placed above it. Payment was refused and check returned on account of the palpable alteration. In the interim the bank was enjoined from paying the check. Where a check payable to bearer is certified for the holder, and the date is subsequently altered without the consent of the bank, refusal of payment by the bank is justified, for such alteration is material and avoids the check except as to holders in due course, who can enforce payment according to its original tenor. But where the alteration, as in this case, is apparent on the face of the check, there can be no subsequent holder in

due course thereof who can enforce payment. The bank having, in addition, been enjoined from paying the check, its proper attitude is to await a court order or judgment in a suit between the rival claimants to the deposit presented by the check, determining who is entitled to the fund.

WHEN CHECK OPERATES AS AN ASSIGNMENT.—A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check. (Section 189.)

A CHECK IS NOT AN ASSIGNMENT OF PART OF THE ACCOUNT ON WHICH IT IS DRAWN.—Before the enactment of the Negotiable Instruments Law, there was, in a number though not in most of the States, another important difference between a check and other bills of exchange. It was the law of this minority of the States that a check made the payee or holder the assignee of a sufficient portion of the drawer's account to pay the check, though an ordinary bill of exchange did not have this effect. Under this rule the bank on being notified of the check was liable directly to the holder to pay it, if the drawer's account was sufficient to meet it. The holder of the check as soon as he acquired it was regarded as becoming owner of so much of the drawer's account as equalled the face of the check. This rule does not exist now in any State which has adopted the Negotiable Instruments Law, for by Section 189 of that statute, it is provided that a check

does not operate as an assignment; and the statute also in Section 127 enacts the rule prevailing generally at common law that a bill of exchange, too, does not operate as an assignment.

A CHECK IS NOT AN ASSIGNMENT EVEN WHEN CERTIFIED.—The last clause of Section 189 is somewhat misleading since it implies that after acceptance or certification, the check does operate as an assignment. The words of the section itself are not perfectly clear. They may mean only that the bank is not liable unless and until it accepts and certifies, which is certainly true, but they may imply also that a check operates as an assignment when the bank certifies. If the comma after the word "holder" were omitted, the former meaning would clearly be the right one; but in view of the heading of the section it is probable that the latter meaning was intended. Nevertheless, the holder of a certified check is not an assignee. He has a direct right against the bank. If he were merely an assignee his claim would be subject to any defence which was good against the drawer.

THE DEGREE OF CARE NECESSARY IN PREPARING A CHECK.—In Critten v. The Chemical National Bank, 171 N.Y. 219, the New York Court of Appeals states the general rule as to the degree of care which must be used in preparing checks as follows: "While the drawer of a check may be liable where he draws the instrument in such an incomplete state as to facilitate or invite fraudulent alterations, it is not the law that he is bound to so prepare the check that nobody else can successfully tamper with

it." If the drawer delivers the check with the amount line left blank and it is wrongfully filled out, he is liable. Trust Co. v. Conklin, 119 N.Y. Supp. 367. He is liable likewise, if he delivers the check with the amount blank partly filled so as to permit insertion of an increased amount without detection. Young v. Grote, 4 Bing. 253. In Timbel v. Garfield National Bank, 121 N.Y. App. Div. 870, a woman signed a check filled out by her husband for $900 leaving a space which enabled him to raise the amount to $4900, and it was held a question for the jury to determine whether her negligence precluded recovery from the bank. Other specific recent cases of negligence of the depositor which makes him liable, are Citizens Nat. Bank v. Reynolds, 126 N. E. (Ind.) 234 and S. S. Allen Grocery Co. v. Bank of Buchanan Co., 182 S. W. (Mo.) 777, where depositors signed checks in blank that were lost or stolen, the blanks filled in and the checks cashed. Most of the cases in which depositors have been held liable for negligence in the execution of the check have been those where blanks have been unfilled or partly unfilled, so as to invite successful alteration. We have been unable to find a case in which it has been held that failure to use protective devices, safety paper or the like, is necessarily negligence; nor a case in which it has been held that the drawing of a check in lead pencil is negligence. At the same time, the general rule announced by the courts and text writers that where the drawer prepares his check "so negligently that it can be easily altered without giving the instrument a

suspicious appearance" he is responsible, is broad enough to cover much more than the leaving of unfilled blanks, and cases may arise in the future where it will be held that the drawing of a check in lead pencil is negligent because the check can be so easily altered. A recent decision in Texas (First Nat. Bank of Newsom v. Walling, 218 S. W. 1080) may have broad application. A check raised from $12.40 to $112.40 was paid by the bank. The court held that the bank "is entitled to show, as a defence, as between it and the depositor, that it has done all that due care and foresight would suggest, and that the real and proximate cause of loss, in making payment of a fraudulently altered check was solely caused by the negligence of the drawer in so preparing the check that it can be easily altered without exciting the suspicion of a prudent and cautious man. * * * The person free from negligence should not suffer the loss. The drawer can blame, as against the bank, no one but himself, as a consequence of his own negligence." There are cases also, where the drawer has been held liable because he was not able to prove that his check which was paid by the bank had been altered. Thus, in Mitchell v. Security Bank, 147 N. Y. Supp. 470, a check for $196.76 payable to "H and A" was stolen from the mail box of the payee, who informed the drawer of the theft and the latter stopped payment. The check in question, however, was returned to the drawer among his paid vouchers at the end of the month, the name of the payee having been changed to bearer. The drawer sued the bank and

alleged that before presentment the check had been "washed" and altered and was therefore a forgery. The court reversed a judgment for the plaintiff and ordered a new trial, saying: "As to the alteration of the check, I am of the opinion that the weight of evidence is against the plaintiff. It was drawn on safety paper, which turns white if washed with acid, yet it shows not the slightest trace of alteration." Whatever may be the truth in this particular case, it indicates the possibility that the drawer of a check which has been altered might be held liable, not because of negligence in execution, but because the alteration has been so skilfully done that he is unable to prove in a particular case that it has been altered. No judicial decision or statute exists at the present time which would require the drawer of a check to use a protectograph, check punch, safety paper or other protective device in order to absolve himself from the charge of negligence in case the instrument were altered or forged.

DUTY TO CARE FOR A CHECK BOOK.—Where a depositor carelessly leaves his check book lying around the office and it is accessible to clerks, the question may arise as to whether he is liable where a blank check is stolen, forged and paid by the bank. Of course, it is elementary that the bank is responsible to its depositor for money paid out on his forged signature, and the negligence of the depositor in this case is not such as will charge him with responsibility. Actually, a depositor may draw a check and sign it all in lead pencil. While there do not seem to be

any cases passing on the validity of a check drawn and signed in lead pencil, there are cases where contracts signed in lead pencil have been held valid. From this, the conclusion can undoubtedly be drawn that a check made and signed in lead pencil is valid. But, although valid, there is considerable doubt whether the drawee bank would be under any obligation to pay same. In view of the fact that the instrument is so susceptible of alteration, it would seem fair to conclude that a bank would be upheld in refusing to honor a check so written and signed because the bank could not safely rely on its genuineness. No case has yet been so decided, but it seems that the best course is for bankers to take such a stand and refuse to pay lead pencil checks on the ground that they are unsafe and that they do not come within the implied contract of the bank with its depositor to honor his written orders.

THE RULE WHERE THE WORDS AND THE FIGURES DIFFER.—Suppose a check is presented for payment in which the figures read \$10.00 and the body of the check reads \$16.00. In this case, because the Act (Section 17) provides: "Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount," the bank would be justified in paying \$16.00. There is, however, a question presented which has not been judicially passed upon as yet. Suppose a check writer

is used which "cuts the filling on checks" and does not write out the amount in words, but uses figures; apparently, a bank would never be justified in paying either amount where there was a discrepancy in such a situation, as this is not a case where the document is expressed as payable "in words and also in figures." There is no doubt that the use of such a device does not affect negotiability, for although the Negotiable Instruments Act requires that an instrument to be negotiable must be in writing, it is undoubtedly true that writing can be expressed by figures as well as by words.

AN UNAUTHORIZED AMOUNT INSERTED BY AN AGENT AND PAID BY THE BANK.—A check was signed in blank as to amount and delivered in that form by the maker to the payee. who was requested to fill in the amount due him, which was $8. The payee disregarded this request and filled in the sum of $80 and received payment from the bank. At the time the bank cashed the check the maker had on deposit only $60. What is the bank's liability under the facts stated? It seems in this case the bank can hold the drawer liable for the full $80. The drawer having intrusted the payee with a check signed in blank, he would be liable although the payee exceeded his authority and filled the check up for an increased amount. The only question would be whether, in view of the fact that the account was not good for such an amount, the bank should have been put on notice; but the bank has a right to pay an overdraft of its depositor and it is

reasonable to believe that the courts would hold the drawer liable to the bank for the full amount paid to him.

THE RIGHT OF THE BANK TO DEMAND THE INDORSEMENT OF THE HOLDER WHEN CASHING A CHECK.—There is a conflict in the authorities as to whether the bank has the right to demand the indorsement of the holder of a check before cashing it. It is held in some cases that the bank cannot demand the indorsement of the payee or holder, and in others it is held that it has such a right. From the standpoint of the bank, such a custom is reasonable and sound, and would work a hardship upon no one.

THE RIGHTS OF THE HOLDER OF A BEARER CHECK.—Does the possession of a check drawn to bearer confer on the bank authority to pay it? Prima facie it does. In the case of Newcombe v. Fox, 1 N.Y. App. Div. 389, it was held that where the instrument is payable to bearer, or, if payable to order, is indorsed in blank, possession is sufficient evidence of title under which to maintain an action and the court will not inquire into the right of possession unless there is some allegation of bad faith. Equally where the holder of a bearer check presents it for payment and the bank has no knowledge or information that he is a thief or finder, or person other than the one the drawer intended to receive payment, the bank will be protected in making the payment. In Citizens National Bank of Evansville v. Reynolds, 126 N. E. (Ind.) 234, the court said: "Where a check

is presented for payment by a person who is unknown to the bank, it becomes the imperative duty of the bank to require him properly to identify himself as the payee, named in the check. For its own protection the bank may go further. It may refuse payment until the stranger brings in a person whom the bank knows to be financially responsible and who is willing to become an indorser." Whether all courts would go to the extent of holding that the bank can refuse payment until the stranger can get another person to assume the obligation of indorser on the check might possibly be questioned, as it might be beyond the power of the payee to procure such indorsement, but at all events the bank is entitled to require the payee satisfactorily to identify himself before it makes payment.

THE DANGER OF DEALING WITH A STRANGER PRESENTING NEGOTIABLE PAPER.—In Morris v. Muir, 181 N.Y. Supp. 913, a case recently decided in the Municipal Court of the City of New York, and affirmed by the Appellate Division, 191 N.Y. App. Div. 947, the court said: "This action is brought to recover the value of four United States Liberty bonds of $100 each. The bonds were stolen from the plaintiff by her fifteen-year-old son Julius and sold by him to the defendants. The defendants are stockbrokers in the City of New York and have established a department for the buying and selling of Liberty Loan bonds. Julius Morris called at the office of the defendants on December 3, December 7 and December 16, 1918, disposing on the first

two dates of one bond each, and on the third of two bonds. Upon entering the defendants' office he was shown to a window where a young girl handed him a card to fill out which contained blanks for his name, address, occupation and citizenship. He thereupon handed in the card and the bonds and was shown to another window, where he received the money. * * * The plaintiff is a hardworking woman, conducting a news stand in this city. Her son Julius is a confirmed thief. At the time of the disposal of the bonds he was less than five feet tall, was very immature in appearance and was suffering from tuberculosis and bore upon his face the stamp of a degenerate, while at the same time he was endowed with natural alertness of mind. This unfortunate youth, after making inquiries how to dispose of his mother's savings, was directed to the defendants. One of the young girls employed in the Liberty bond department asked him to fill out the card. It is very significant, to show the lack of intelligence on the part of the young woman, that when Julius omitted to fill out one of the lines in the card, she, after inquiring of Julius, inserted that he was in business for himself. It is difficult to understand, after seeing this poor, wretched individual, how anybody with any degree of intelligence or possessed of ordinary caution would have believed that he was the owner of securities and conducting a newspaper business on his own account. The defendants took no precautions whatever against fraudulent transactions, except that they had a list of stolen bonds, and before the money was paid for the bonds

the numbers were compared. All comers were served without inquiry, with the result that the defendant did a very large business of Liberty bonds, exceeding for the month of December 20,000 transactions. It is common knowledge that many people of small means have acquired Liberty bonds. They have no facilities for properly safeguarding these securities, and of necessity have to keep them in their homes, where there is always danger of the bonds falling into the wrong hands. The manner in which the defendants conducted their Liberty Loan department provided an easy way for thieves to dispose of their plunder. It is a case of 'no questions asked.' I do not for a moment wish to charge the defendants with the intention of extending an invitation to bond thefts. They are men of good reputation. I believe it is only necessary to call their attention to the lack of precautionary measures, and that the proper remedy will be applied. Upon the facts in this case I do not hesitate in arriving at the conclusion that the action of the defendants in buying the bonds amounted to bad faith within the authorities. * * * In the Paviour case, 164 N.Y. 281, at page 284, the court says: 'While he was not bound to be on the watch for the facts which would put a very cautious man on his guard, he was bound to act in good faith (Second Nat. Bank v. Weston, 161 N.Y. 520, 526; Cheever v. Pittsburgh, etc., RR., 150 N.Y. 59, 66). Even if his actual good faith is not questioned, if the facts known to him should have led him to inquire, and by inquiry he would have discovered the real situation, in a com-

mercial sense he acted in bad faith and the law will withhold from him the protection that it would otherwise extend.' Tested by the law applicable hereto, I hold that the defendants acquired the bonds in bad faith. Though they had no actual knowledge of the theft, the appearance of this immature, diseased, and degenerate boy, claiming to be the owner of the bonds and in business for himself, was sufficient to deny his right to the bonds to the mind of any person with ordinary discrimination, or at least to thrust the duty upon the defendants to make further inquiries. They had no right to deliberately shut their eyes to obvious facts." Applying the same principles, the student may readily see under what circumstances a bank is justified in refusing to pay a bearer check to the holder without further identification.

CHECKS "PAYABLE ONLY THROUGH THE NEW YORK CLEARING HOUSE."—The question has been raised as to whether such a clause on a check does not affect negotiability. There is no decision on this point. The case of Commercial National Bank v. The First National Bank, 118 North Carolina 783, is analogous. In that case a provision was stamped across the face of the check: "This check positively will not be paid to the Gastonia Cotton Manufacturing Co., the Gastonia Banking Co., or any of their agents," and it was held that it did not affect negotiability. The court said: "In England the system of 'crossed checks' has long been recognized as valid. * * * By that system there is stamped across the face of the check the name of a certain banker

through whom it must be presented for payment, and if presented by anyone else, it will not be honored. This does not destroy negotiability in any wise. This present case does not go that far, but merely stipulates that the check will not be honored if presented through one agency named. This cannot be deemed an unreasonable restriction of trade. Nor is it a boycott. There is no evidence of a conspiracy to injure the agency named, but it is agreed as a fact that it was an effort on the part of the drawer firm to prevent its transactions and the nature and extent of its business becoming known to a rival house by its checks passing through that channel."

A CHECK AS PAYMENT.—A check may be taken as absolute payment, but unless there is an agreement to this effect, the rule is almost invariably held to be that a check is simply taken as conditional payment. Thus, where a check is given in payment of a note, the note is not canceled until the check is paid, and if for any reason the check is not good, the holder of the note may still sue. Burkhalter v. The Erie Second National Bank, 42 N.Y. 538 holds so, and is in accord with the general rule.

CHECKS DRAWN AMOUNTING TO AN OVERDRAFT.—This situation arises when a person draws several checks, the total of which amounts to more than his balance in the bank. Thus, if A's bank balance is $50 and he draws checks for $10, $25, $50 and $60 in favor of different parties, and all are presented through the clearing house at the same time, the bank has a problem as to which checks to pay, if

any. There is little doubt that the bank must pay such of the checks as the depositor has sufficient funds to meet, and may choose which to pay and which to reject, but it will be liable in damages if it returns all such checks unpaid. In case the bank does return all the checks unpaid, the depositor has a cause of action against the bank for damages. The question is, what are the damages which may be recovered? If the depositor cannot show any actual damage he is entitled to merely a nominal verdict, the amount usually being 6 cents. The annoyance caused by having depositors sue in such cases has led some States to enact that a suit cannot be brought against a bank for failure to honor a check drawn by its depositor unless actual damages can be shown.

CHECKS WITH THE EXPRESSION "THIS IS A RECEIPT IN FULL."—It is very common to issue checks with an expression on the back: "This check pays in full the following account. If incorrect please return." A owes B $100. He sends him his check for $50 with such an expression on it. May B accept and cash the check for $50 and then sue for the balance? This involves a proposition in contract law.

A SMALLER SUM OF MONEY IS NOT SUFFICIENT CONSIDERATION FOR THE PROMISE SIMULTANEOUSLY TO PAY OR DISCHARGE A LARGER LIQUIDATED SUM.—This is the principal exception, that in contracts or promises relating to a fixed sum of money, the consideration cannot be the simultaneous payment or discharge of a smaller sum of money on the other side.

If A promises B $100, it will not be good consideration for B to promise in exchange $50, or even $99.99, payable at the same time and place. In other words, the law requires adequacy in exchanges or agreements to exchange money. A owes B $100 and says to him, "I can't pay it all," or "I don't want to pay it all. Will you let me off for $50?" B replies, "Yes, I will take $50." The agreement is not binding, and even if the $50 is actually paid, B may afterwards come and say, "You paid me only part of the debt you owed me. It is true I said I would call the whole thing square, but there was no consideration sufficient in law for my promise, since you paid me only part of what you were bound to." This rule of common law, though generally well established, does not exist or is much qualified in a few States—Georgia, Maine, Mississippi, New Hampshire, North Carolina, Virginia.

UNLIQUIDATED CLAIMS MAY BE DISCHARGED BY ANY AGREED SUM.—The case cited in the preceding paragraph must be distinguished from another. Suppose A owes B some money for services, the price of which was never exactly fixed, but which B says are of the value of $100. Then if B agrees to take $50 in satisfaction of his claim against A, B is bound; the transaction is effectual. The difference is between what is called a liquidated and an unliquidated claim.

DEFINITION OF A LIQUIDATED CLAIM.—A liquidated claim is one of an exact amount definitely fixed. Such a claim, as has been said, cannot be satisfied by partial payment or promise of partial

payment. But an unliquidated or a disputed claim—a claim subject to a real bona fide dispute, not merely a dispute trumped up for the purpose of disputing a good claim—may be discharged by any payment on which the parties agree. The law does not know how much the unliquidated claim is worth, and will allow parties to bargain for the sale of the unliquidated claim, just as it will let them bargain for the sale of a horse for which they may fix such a price as they choose, and that price will not be revised.

ILLUSTRATION OF A CHECK SENT IN FULL PAYMENT FOR LESS THAN AGREED PRICE OF AN ARTICLE.—A sells a car to B for $500, but before B pay A, he finds the car is not worth that amount. B draws a check to A for $400 and writes upon its face the words "In full payment for one car." A indorses and cashes the check and then tries to collect the remaining $100. Can A collect the $100? Should the words "In full for one car" have been put on the back of the check to make it binding? The decisions quite generally hold where a check for a less amount is given "in full of account" or "in full of all claims" and the claim for which the check is given is unliquidated and in dispute, that the acceptance by the creditor of the check constitutes an accord and satisfaction and bars him from recovering anything further. But where a check for less amount and stated to be "in full" is given for a claim which is liquidated, the acceptance by the creditor of the check is not an accord and satisfaction and does not bar recovery of the balance due. Such being the

general law, the question in the present case depends chiefly upon whether the $500 was a liquidated or unliquidated claim. If the parties agreed that the price of the car was $500, then the mere fact that the purchaser subsequently, after delivery of the car, comes to the conclusion that it is worth only $400, would not, it seems, constitute an unliquidated claim. If after the delivery of the automobile, the purchaser should discover that certain misrepresentations had been made concerning parts thereof, this might create an equity which would entitle him to defend payment of the full amount; but unless there is something of this kind in the case, if B agrees to pay $500 for a car and accepts delivery and there is no fraud, misrepresentation or concealment, B owes $500 to A, and A's claim is liquidated for that amount; so that if B tenders his check for $400 "in full for one car," its acceptance by A would not bar him from recovering the balance. On the other hand, if there is a bona fide dispute as to the amount due and the claim is unliquidated, the acceptance by A of B's check for $400 "in full for one car" would bar him from recovering anything more and it would not be necessary that these words be indorsed on the back to make it binding upon A.

PAYMENT BY THE BANK OF A CHECK AFTER THE DRAWER'S DEATH.—Where a bank pays a check signed by its depositor, when the depositor had died two days before the check was paid, is the bank liable? It is frequently stated that the death of the depositor revokes the bank's authority. However, the better ruling now is believed

to be that the bank is protected. Chief Justice Cullen in the case of Glennon v. Rochester Trust & Safe Deposit Co., 209 N.Y. 12, said: "It is singular that there should be such a paucity of judicial decisions on this question, as seems to be the case. In my search through the reports I have been able to find only one on the precise point, Rogerson, Executor, v. Ladbroke decided by the English Common Pleas in 1822 (1 Bing. 93), in which it was held that the payment or rather the charge of a check to a depositor's account made by the banker after the death of the depositor, but before the bank had received knowledge of that fact, was a valid payment, and that the banker was not liable for the amount. There is another case often cited to the same effect where the lord chancellor expressed the opinion that if the holder of a check had collected the money from the banker after the death of the drawer, but before the banker had knowledge of death, no court would take the money away from her. This was purely obiter, simply the chancellor's opinion, for, as a matter of fact, the suit in which the opinion was expressed was dismissed and the complainant remitted to her action at law. On the other hand, none of the cases cited by the learned counsel for the appellant is authority for the contrary proposition. The facts in this case were: The action was brought by the plaintiff as administrator of a depositor in the defendant trust company to recover the amount of a deposit made by the intestate. The defence was payment and an assignment of the deposit by the intestate to a third party. The payment proved was that of

a check drawn by the intestate, but not presented to or paid by the defendant until after the death of the former, of which the defendant claimed to be ignorant. Deciding the case, the court said: 'It is further true that the common-law doctrine that death revokes an agent's power, even as to third parties dealing with the agent in good faith without notice, is the general rule in this State. At this point we reach the very crux of this case, and the question is whether payment of checks by banks or bankers is an exception to the rule stated. I think it is. It must be first borne in mind that the rule itself is an exception to the still broader rule that revocation of the power of an agent does not affect third parties dealing with him in good faith without notice. This is the rule of the civil law even where the agency is revoked by death. The common law rule in some States has been changed by statute, in others repudiated, while in still others greatly limited. There is a difference between the liability of banks to their depositors and that of ordinary debtors to their creditors which justifies excepting the payment of checks from the rule. If an ordinary debtor refuses to pay his debt to the agent of his creditor, his liability is in no respect increased. It is not so with a bank. Its contract with the depositor is to pay his checks as long as his deposit is sufficient for the purpose, and for a failure to pay the checks the bank is liable for any injury to the credit of the drawer occasioned thereby. In the ordinary conduct of a bank but a minute fraction of its payments is made directly to its depositors. The others

are made on checks in favor of third parties, usually, at least in large cities, presented through other banks or the clearing house. The number of depositors is often very great, many of them living at other places than where the bank is located. Of the death of those prominent, either by their public positions, their business activities or great wealth, the bank might be apprised; but of the great mass, their deaths would pass unknown by the bank unless notice of the fact was given. It would be utterly impracticable for business to be done if, before a bank could safely pay checks, it must delay to find out whether the drawer is still living. But the dominant and controlling reason, for holding that the usual rule that a debtor is not protected in payment to an agent after the death of his principal, though without knowledge of that fact, is not applicable to the payment of checks by banks, is that such has almost universally been accepted as the law. As already said, all the text-books so state the law (in England it has been so settled by Section 75 of the Bills of Exchange Act of 1882), and apparently the whole country has assumed the text-books to be right. The rule thus adopted, if not strictly a rule of property, is a rule of conduct affecting property interests that very closely approximates to a rule of property. I think the fact that the rule has been adopted by the community is reasonably clear. The use of banks as depositories of money and the practice of making payment by checks prevail in this country to an extent far beyond that existing in any other, so that the situation presented in this case

must have arisen frequently. True, where the estate of the depositor is solvent and the check is given for value, it is of not practical moment whether the bank is liable for the payment of a check after the death of the drawer or not. Very many, however, must have been the cases where either the estate was insolvent or the check was given without value and the bank has paid it after death, in ignorance of that fact. Yet, in my research, I have not been able to find in the reports in this country or in England a case where it was sought, under such circumstances to hold the bank liable, except in the Rogerson Case, supra, in which the attempt failed."

DEPOSITOR'S DUTY TO EXAMINE PASS-BOOK AND EFFECT ON BANK'S LIABILITY FOR FORGED CHECK.—Many banks have adopted the system of returning canceled checks with a statement of the depositor's account once a month. As we have seen, a bank which pays out a forged check cannot charge up this amount to its depositor. It is simply an application of the ordinary principle of contracts. The bank makes a contract with a depositor when it receives his money to pay it out on his order. Of course, a forgery is not his order. Recent cases, however, have raised the question as to the effect of the system of returning canceled vouchers with a statement once a month on this rule of law. The facts in the recent case of McCarty v. The First National Bank of Birmingham, 85 Southern Reporter 754 are as follows: "The plaintiff sues to recover $7,290 alleged to be due him from the bank as a

balance on his checking account carried with the bank. The bank paid out the amount in question upon a series of checks, drawn in the name of the plaintiff, and shown to have been forgeries. The bank denies any liability for this money, on the ground that the plaintiff was guilty of negligence in failing to discover and report other forgeries of his checks by the same party on the same account, during a period just preceding the forgeries in question, whereby the bank was induced to pay the latter series later, and prevented it from having prompt recourse. The plaintiff, a business man of Birmingham, became a depositor of the defendant bank in January, 1915. This was his reserve account, as to which his deposits and withdrawals were in substantial sums; his regular daily checking account being kept elsewhere. One Carney, whose social relations with plaintiff's son gave him access to plaintiff's office, began his series of forgeries against this account on March 5, 1917, drawing one or more checks each month down to September, when he drew September 1st a check for $800, September 10th a check for $500, and a check for a like amount on September 24th. The last check overdrew the account and led to the discovery of the forgery. The checks were all made payable to plaintiff's son, were ostensibly indorsed by him, and were presented by and paid to Jim Carney. The checks thus drawn and paid prior to July, 1917, aggregated $2,400, and this sum was repaid to plaintiff by the bank in October. Plaintiff's bank book was balanced and returned to him, with his canceled checks, on

February 24, 1917. He kept the book from then until July 3, 1917, when it was sent to the bank to be balanced. It was balanced and ready for delivery to the plaintiff along with the canceled checks on July 5th following, and was placed near the bookkeeper's window, along with other similar books, to be delivered to plaintiff whenever he might call for it. Testimony for the bank tended to show that plaintiff did not call for the book until September 4th following, on which date it was in fact delivered to his agent on call; but plaintiff placed it in his safe, without examining it or the canceled checks, and plaintiff had no actual knowledge of the forgeries until September 24th, the date of the last forged check, which overdrew his account. The bank also had no knowledge of the forgeries until then informed by the plaintiff." The court held that: "From the relations the depositor and the bank bear towards each other, there is a duty also upon the depositor to examine his accounts and vouchers, and to make known to the bank any improper vouchers or charges returned, and where injury results to the bank from the failure of the depositor to do his duty in this respect, the law holds the depositor liable for such injury, the result of the depositor's omission. * * * In all of the reported cases, this duty of diligence was imposed upon the depositor by reason of the fact that his passbook and canceled checks had actually been returned to him, so that notice of the forgeries was placed in his possession, and knowledge of them thereby made immediately accessible. The rationale of the rule is

that, having been furnished with the means of knowledge, it is the depositor's duty to know; and, knowing, he is under the further duty of informing the bank of whatever he finds to be wrong. * * * No case in point, for or against this proposition has been cited by counsel, and, in view of our own unrewarded search for authority, we are inclined to accept the statement, made by counsel for appellant, that this case is one of first impression, at least in American courts. It is clear that a depositor is not required to anticipate errors or irregularities in his account, and particularly the payment by the bank of forged checks; and hence the law imposes upon him no duty to initiate an inquiry with respect to such matters, and, in the absence of an agreement, express or implied, between him and the bank, he is not bound to ask for a statement of his account at any time, but may rely upon the bank's observance of all of its obligations in the premises. There was no such agreement here, and the question is whether merely leaving his passbook to be balanced by the bank imposed upon the plaintiff the duty of calling for the book, and the canceled checks customarily returned therewith, in a reasonable time, or, indeed, at any time, under the penalty of releasing the bank from liability for the repetition of errors already committed. We are satisfied that the law, operating upon the mere relation of the parties, imposed no such duty upon the depositor, and, so far as we are advised, no court has ever so held. * * * The testimony of the officers of the bank shows that the bank had no system for the

delivery of balanced passbooks to its local customers, other than at the bookkeeper's window, upon the customer's call in person or by agent. But it shows, also, that the bank had no rule, and never sought to enforce any, that its customers should call for their balanced passbooks and canceled checks at any time, except as their convenience or fancy might suggest. So, very clearly, the plaintiff was under no contractual duty, express or implied, or prescribed by any regular and well-known custom, to call for his book and vouchers at any particular time, or within any period of time that might be designated as reasonable, even if it were conceded that his breach of such an agreement could be visited with the consequences here insisted upon by the bank."

A BANK'S RIGHT TO RECOVERY AFTER CERTIFYING AN OVERDRAFT CHECK.—In the case of Prowinsky v. Second National Bank, 265 Federal Reporter 1003, the facts were the defendant at various times covering a period of three months deposited in plaintiff bank the sum of $1,127.26, and drew therefrom, reducing his balance to $26.87. He then drew a check payable to his order in the sum of $1,036.80, which the cashier, through a mistake of one of the bookkeepers, certified as good, and upon such certification defendant indorsed the check and negotiated it at another bank in the city of Washington. In regular course plaintiff bank paid the check. When the mistake was discovered, demand was made upon defendant to pay the overdraft. He denied liability. The court said: "This is not the

case of a paying bank attempting to hold the payee of the check, who is not the drawer of the check. The action here is against the drawer of the check, and, whether the check is certified or not, it merely amounts to an overdraft for which the bank may sue in indebitatus assumpsit (action of assumpsit brought upon the promise or contract implied by law in certain cases) for money paid to his use. To the rule that one who pays money to another under an honest mistake of fact may, in the absence of an equitable defense, recover the money so paid, there is no exception. It is a general rule that where money is paid by mistake, neither party being in fault, the party paying the money may recover it as money paid without consideration, as money had and received by the defendant to the use of the plaintiff. Hibbs v. Beall, 41 App. D.C. 592.

WHEN A CHECK IS CONSIDERED "PAID."—At what time is a check received through the mail regarded as paid? Two recent decisions, Hunt v. Security State Bank, 179 Pac. Rep. 248 and Bank v. Bank 127 Tenn. 205, indicate how this question arises. In the first case, a check on the Security State Bank came in by mail from another bank, with directions to remit. The Security State Bank stamped the check "paid," and placed it on a spindle. Before the bank had charged it to the drawer's account, or forwarded a draft in payment for it, the drawer came to the bank and instructed it not to pay the check. It was held that stamping the check did not constitute payment and the stop payment order

was received in time. In the second case, the drawee bank after receiving a check by mail stamped it "paid," placing it on a hook for cancellation. The drawer's account was overdrawn by this payment but the bank frequently accomodated him this way. However, when he did not deposit sufficient funds the next morning to cover it, the bank erased the "paid" mark, protested the check and returned it to the forwarding bank. The drawee bank had never made any entry on its books. It was also held here that no final payment had been made. The general rule undoubtedly is that where a check against sufficient funds is received by the drawee through the mail, it is paid at the time it is charged to the drawer's account and canceled; so that thereafter the drawer cannot stop payment, nor can a receiver or assignee of the drawer claim the fund, although remittance has not been made. Some courts hold the check paid even before charged to an account where it has been canceled and filed as paid.

THE RIGHTS OF A CHECK HOLDER AGAINST A DRAWEE BANK.—It was formerly held in some States that the drawing of a check amounted to an assignment of as much of the funds of the depositor as the amount on the check, and where this was so, the holder of the check would have a right of action against the drawee bank, if the check was not negotiated for any good reason. This, however, has been changed by the Negotiable Instruments Law, which provides in Section 189 that: "A check of itself does not operate as an assignment of

any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check." This rule of law leads sometimes to startling results. Thus in the recent case of Edwards v. The Guaranty Trust Co. 192 Pacific Reporter 324, the facts were: a check for $4,000, was drawn on the defendant bank by one B. L. Liveson on February 28, 1917, payable to the plaintiff, and intended as a gift to him of the amount mentioned. On March 2, 1917, plaintiff deposited this check in his bank at Long Beach, and on the following day it was presented to the defendant bank for payment, which was refused. Liveson died on March 4, 1917, and the check was never honored by the bank. The court held that, as the check involved in this controversy was not cashed prior to the death of Liveson, the attempted gift was not completed by delivery, and therefore the payee could not recover the amount from the estate of the donor. On this point the court said: "A bank occupies the position of debtor to its depositors, and a check drawn against an account is only a direction to pay the amount thereof to the payee. No contractual relation with the payee, or legal obligation to him, is created by the signing of the check, and refusal to cash the check does not give rise to a cause of action in favor of the person to whom it is made payable. A gift is a voluntary transfer, without consideration, of personal property, and becomes effective only on delivery. Until the purpose of the donor is carried into execution by a delivery of the subject of the gift, no

interest vests in the donee. The mere privilege to be the recipient of a gift is common to all, and cannot be possessed or used to the exclusion of others; hence, it does not constitute property capable of ownership. Before the plaintiff can recover damages herein, he must allege and prove that the defendant has committed some unlawful act which has resulted in injury to the person or property of the plaintiff. The only allegation in the count under consideration is to the effect that the defendant prevented plaintiff from becoming beneficiary of Liveson's bounty; and it is thus made to appear that plaintiff suffered no loss of property by defendant's action in refusing to cash the check."

GIVING A DUPLICATE FOR A LOST CHECK.—Suppose the payee of a check, claiming it has been lost, obtains another check from the drawer. The payee cashes the second check and later the first check. The drawer of the check stopped payment on the first check and it is thereafter returned by the bank which cashed it to the bank on which it was drawn. In such a case the bank cashing the check is entitled to enforce the check against the drawer, provided it is a holder in due course.

STOPPING PAYMENT ON CHECKS.—May the drawer of a check, without any good reason, arbitrarily stop payment of his check? Must the bank obey his instructions without questioning his motives? The Negotiable Instruments Act provides that: "A check of itself does not operate as an assignment of any part of the funds to the credit of the

drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check." (Section 189.) Therefore, the check is a mere order on, and authority to, the bank to pay, and the customer has the right to revoke such authority and countermand such check. After receiving a stop payment notice, the bank will pay the check at its peril. It is its duty to obey the instructions and refuse to pay and in such event, as shown by the section above quoted, it is under no liability to the holder whose sole recourse is against the drawer and any prior indorsers. The drawer has this power of countermand irrespective of any fraud or misrepresentation. The bank is under no duty to inquire into his motive. As between bank and customer, the latter has the right to revoke the bank's authority to pay and it is the bank's duty to obey his instruction. Suppose a customer requested his bank to stop payment on his check of $200. The stop order is unfortunately overlooked and the check is paid. The bank had evidence from the holder that the maker received value for the check, and the holder refuses to refund the amount. Where a bank pays a stopped check it does so at its peril, but where payment is made to a holder in due course or where the drawer has received full value for the check, there is ground for maintaining the contention that the bank can set off the amount against the drawer's account as equitable purchaser of the check. Where a stopped check is an enforceable obligation against the drawer in the hands of a holder in due course, the drawer is not

damaged because of its payment by the bank, for, if refused payment, the drawer would be answerable to such holder.

STOPPING PAYMENT ON CASHIER'S AND CERTIFIED CHECKS.—The customer of a bank purchased its cashier's check of $600, payable to his order. Afterwards, without giving any specific reason, he wired the bank a request to stop payment and, upon presentment of the check, payment was refused and the item protested. Later the bank learned that the customer had delivered the check in some trade and, becoming dissatisfied, wired the stop payment order. The bank is threatened with a suit by the holder to enforce payment of the check. Certified and cashier's checks being used in place of money, the courts refuse, as a general proposition, to permit the issuing bank to refuse payment and defend against the holder, even though he has procured the check from the bank's customer by fraud. In New Jersey, however, it has been held, contrary to decisions elsewhere, that where a check has been certified for the drawer before delivery by him (as distinguished from certification for the holder after delivery by the drawer), the certifying bank can plead fraud of the holder upon the drawer in defence of payment. In this case the bank is the primary debtor upon the check and is liable thereon to the holder who has the legal title by indorsement.

THE DAMAGES A HOLDER MAY RECOVER WHEN A BANK WRONGFULLY DISHONORS A CHECK.—Where a bank, through error and

without malice, refuses to pay the check of a customer drawn against sufficient funds, all the courts which have passed on the question, except those of New York, hold that the customer, if a merchant or trader, may recover substantial damages without proving actual damage. Where the customer is a non-trader most cases require proof of substantial damage as a basis of recovery. The best method to abrogate the rule that substantial damages will be presumed without proof of actual damage would be in procuring legislation which will provide that damages will be limited to such as the customer can prove. The following law recommended by the American Bankers Association has been passed in the States below named: "No bank shall be liable to a depositor because of the non-payment through mistake or error and without malice, of a check which should have been paid, unless the depositor shall allege and prove actual damage by reason of such non-payment and in such event the liability shall not exceed the amount of damage so proved." 1915, Idaho, Montana, New Jersey, Oregon; 1917, California; 1919, Alabama, Michigan, Missouri, North Carolina, Ohio, Pennsylvania, West Virginia; 1921, Arkansas (different from A. B. A. Measure), Illinois, Tennessee.

THE DANGER OF TAKING A CHECK TAINTED WITH ILLEGALITY.—The facts in the case of Larschen v. Lantzes, 189 N. Y. Supp. 137, decided by the New York Supreme Court, Aug. 6, 1921, illustrate this strikingly. In this action against maker of check given to pay $60, lost in playing at

cards, the evidence authorized the finding that the plaintiff is a holder in due course, and the court awarded him a recovery. On appeal, the New York Supreme Court held: "The undisputed evidence of both the maker and the payee of the check is that the check was given in payment of a gambling debt. Appellant contends that, as our statute makes a check given to pay a gambling debt void, a recovery, even in a suit by a holder in due course is not warranted. By the provisions of the Penal Code all wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance casualty or unknown or contingent event whatever, are declared unlawful (Sec. 991); all contracts for or on account of any money or property or thing in action so wagered, bet or staked, are void (Sec. 992); and 'all things in action, judgments, mortgages, conveyances, and every other security whatsoever, given or executed, by any person, where the whole or any part of the consideration of the same shall be for any money or other valuable thing won by playing at any game whatsoever * * * * shall be utterly void.' (Sec. 993.) Although I find no prior adjudication in this State making an instrument given in payment of a gambling debt void in the hands of a holder in due course, in view of the decision of the Court of Appeals in Sabine v. Paine, 223 N. Y. 401, that our statute declaring usurious instruments void is not repealed expressly or by implication by the Negotiable Instruments Law, so that a note void in its inception for usury is void in the hands of an innocent holder for

value, the conclusion seems inevitable that the same rule applies to instruments or to 'things in action' which by another statute are declared to be 'utterly void.' As the court said in the case cited (223 N. Y. at p. 404), 'an instrument which a statute, expressly or through necessary implication, declares void, strictly speaking, is a simulacrum only. It is without any legal efficacy. It cannot obligate a party or support a right.' Or as the judge writing the opinion of this court in the Sabine case says in a subsequent case (Lipedes v. Liverpool & L. & G. Ins. Co., 229 N. Y. at p. 209): 'It is a general rule of interpretation that contracts declared in terms void by statute because interdicted by law or by public policy, are, in the correct and true meaning of the word, void.' Among the cases cited by our Court of Appeals in support of its decision in the Sabine case is Alexander & Co. v. Hazelrigg, 123 Ky. 677, wherein the Court of Appeals of Kentucky held that the statute of that State making gaming contracts void, prevented a recovery by an innocent holder against the maker of a note given in payment of a bet or wager upon the result of a horse race. A number of other cases decided in accordance with local statutes in different States are referred to by Williston in his work on Contracts (Vol. 3, Sec. 1676, note) although the textwriter states that 'the tendency of the modern law in regard to instruments illegal because based on a gambling consideration is to protect the holder in due course.' "

CHAPTER XIV

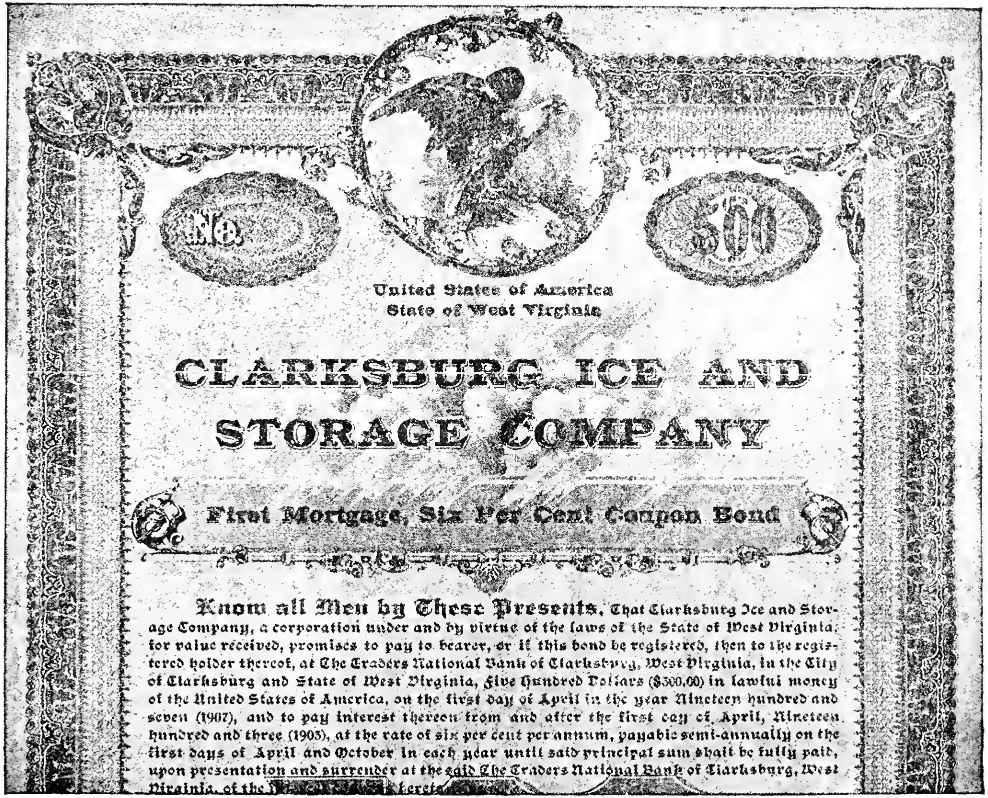
Quasi-Negotiable Documents

WE mentioned in the introductory chapter certain other documents besides bills, notes and checks which, by virtue of recent legislation, have acquired the characteristics of negotiable paper. We shall briefly consider these documents in this chapter.

STOCK CERTIFICATES.—A stock certificate is one of the quasi-negotiable instruments of commerce, at common law not fully negotiable like bills and notes, but, nevertheless, having some of the attributes of negotiability, especially in States where what is called the Uniform Transfer of Stock Act has been enacted. This statute applies only to corporations of those States which have passed the statute.

TWO METHODS OF TRANSFERRING STOCK.—Stock may be transferred in two ways: first, by delivery of the certificate with the indorsement upon it of the owner of the stock, indicating that he assigns or authorizes the assignment of the stock and second, by delivery of the certificate, with a separate document of assignment attached, stating that the owner of the certificate assigns or authorizes the transfer of the stock. This second method is not so good as the first, where the assignment is on the certificate itself, because if for any reason the separate document should become detached from the certificate, the transferee's right would not be apparent,

CORPORATION BOND



No.

500

United States of America
State of West Virginia

CLARKSBURG ICE AND STORAGE COMPANY

First Mortgage, Six Per Cent Coupon Bond

Know all Men by These Presents, That Clarksburg Ice and Storage Company, a corporation under and by virtue of the laws of the State of West Virginia, for value received, promises to pay to bearer, or if this bond be registered, then to the registered holder thereof, at The Traders National Bank of Clarksburg, West Virginia, in the City of Clarksburg and State of West Virginia, Five Hundred Dollars ($500.00) in lawful money of the United States of America, on the first day of April in the year Nineteen hundred and seven (1907), and to pay interest thereon from and after the first day of April, Nineteen hundred and three (1903), at the rate of six per cent per annum, payable semi-annually on the first days of April and October in each year until said principal sum shall be fully paid, upon presentation and surrender at the said The Traders National Bank of Clarksburg, West Virginia, of the

This bond is one of a series of sixty (60) bonds of like tenor and amount numbered respectively from 1 to 60 inclusive, for five hundred Dollars ($500.00) each, and maturing in series and becoming due and payable as follows, to wit: Bonds numbered from 1 to 10 inclusive, on the first day of April, 1904; bonds numbered from 11 to 20 inclusive, on the first day of April, 1905; bonds numbered from 21 to 30 inclusive, on the first day of April, 1906; bonds numbered from 31 to 40 inclusive, on the first day of April, 1907; bonds numbered from 41 to 50 inclusive, on the first day of April, 1908; bonds numbered from 51 to 60 inclusive, on the first day of April, 1909; said bonds amounting in the aggregate to Thirty Thousand Dollars ($30,000.00); and upon default of said Clarksburg Ice and Storage Company in the payment of any of said bonds at maturity, or of the interest thereon, all of said bonds then unpaid shall immediately become due and payable. All of said bonds are equally secured by and under a mortgage or deed of trust, bearing date the first day of April, Nineteen hundred and three (1903), executed by the said Clarksburg Ice and Storage Company to John W. Davis as Trustee, which mortgage or deed of trust, with the terms and conditions thereof, is hereby referred to and made a part of this bond and the coupons attached hereto.

This bond may be registered in the name of the owner in the manner and with the effect provided in said mortgage.

This bond is subject to redemption at the option of the said Clarksburg Ice and Storage Company at any time after the date hereof, on any day on which interest is payable thereon, upon payment of the principal and interest then accrued, and a premium of five per cent upon said principal, in the manner and with the effect set forth in said mortgage.

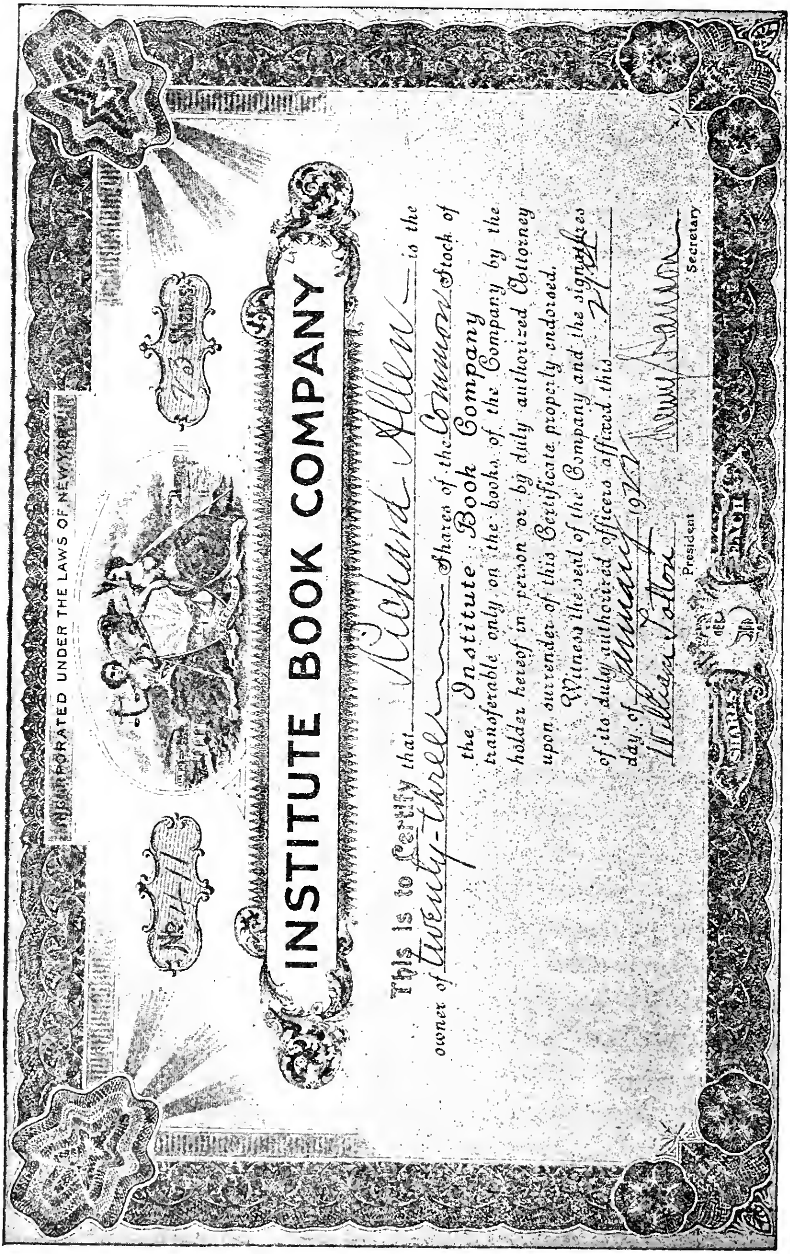
This bond shall not become obligatory until duly authenticated by certificate of the Trustee endorsed hereunder.

In Testimony Whereof, the said Clarksburg Ice and Storage Company has caused its corporate seal to be hereto affixed and these presents to be signed by its President and attested by its Secretary, this first day of April, 1903.

Clarksburg Ice and Storage Company.

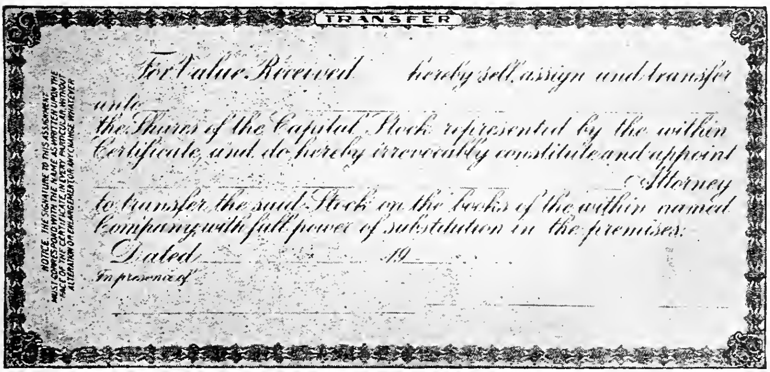
By ______________________ President.

Attest: ______________________ Secretary.


INCORPORATED UNDER THE LAWS OF NEW YORK
No.
Shares
INSTITUTE BOOK COMPANY
This is to Certify that Richard Allen is the owner of twenty-three Shares of the Common Stock of the Institute Book Company transferable only on the books of the Company by the holder hereof in person or by duly authorized Attorney upon surrender of this Certificate properly endorsed.
Witness the seal of the Company and the signatures of its duly authorized officers affixed this 2nd day of January 1921
William Patton
President
Secretary

and therefore the Transfer of Stock Act provides that if a purchaser should get possession of the stock certificate with an indorsement upon it, he would take precedence over even a prior assignee who had a separate paper assigning the certificate to him. Of course, after the transfer is duly registered on the books of the company, then it makes no difference whether that transfer was secured by means of a separate power or assignment or by means of one written on the certificate itself.

EFFECT OF TRANSFER ON THE BOOKS OF THE COMPANY.—What is the effect of transfer on the books of the company? Under the common law, stock was originally transferable, just like any intangible right, merely by agreement of the



TRANSFER

For Value Received hereby sell, assign and transfer unto

the Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint

Attorney to transfer the said Stock on the books of the within named Company with full power of substitution in the premises.

Dated 19

In presence of

NOTICE. THE SIGNATURE TO THIS ASSIGNMENT MUST CORRESPOND WITH THE NAME AS WRITTEN UPON THE FACE OF THE CERTIFICATE, IN EVERY PARTICULAR, WITHOUT ALTERATION OR ENLARGEMENT OR ANY CHANGE WHATEVER

parties, to which requirement was added as a necessity, when stock certificates became common, the delivery of the certificate itself. But it was convenient for the company to know who was the owner of its stock. It was inconvenient to have stockholders buy and sell without any notice to the company, and therefore a common by-law was that stock should be transferred only on the books of the company. The Uniform Transfer of Stock Act goes back partially to the old rule, since the transfer of the certificate with the indorsement or separate assignment is what transfers the stock, not the transfer on the books of the company; but in order that the corporation may not be inconvenienced, it is provided that the corporation shall have the right to pay dividends to all persons registered on the books of the company, such persons being the apparent owners, and that only such persons have the right to vote. An analogous custom that shows the importance of registration of stock transfers on the books of the company is the registry of deeds in the transfer of real estate. It is the deed, not the record of it, which creates a title, but an unrecorded deed may be defeated by creditors or purchasers without notice, so that to protect himself fully the owner of land is obliged to have his deed recorded.

DIFFICULTIES IN TRANSFER AFFECT PURCHASER AND ALSO CORPORATION.— The difficulties in the transfer of stock may be looked at (1) from the standpoint of a purchaser of the stock, including within the name of purchaser one who lends

money on the stock as well as one who buys it, and (2) from the standpoint of the corporation whose duty it is to transfer the stock on its books. Generally the difficulties which confront the purchaser are the same as those which confront the corporation when it is asked to transfer. If the purchaser should get a defective right when he bought, then the corporation, if it should transfer, would generally get into trouble also.

LEGAL AND EQUITABLE DIFFICULTIES IN TRANSFERS.—The main difficulties which arise may be divided into legal and equitable difficulties. By legal difficulties are meant cases in which the purchaser will not get a good legal title. By equitable difficulties are meant cases in which the purchaser will get a good legal title but which will be subject to an equitable right in favor of some other person. The person who has an equitable right cannot reclaim the stock from one who is, or succeeds to the rights of, a bona fide purchaser for value without notice.

LEGAL DIFFICULTIES; FORGED CERTIFICATE.—First, let us consider the legal difficulties. The certificate of stock may be forged. The purchaser of a forged certificate of stock, of course, gets nothing in the way of stock. He does get the right, however, to sue the person who sold him the stock on an implied warranty of genuineness. Analogous to the situation of the purchaser is the situation of the corporation if, on receiving a forged certificate with a request for a transfer, it should transfer ownership on the books, completing the transfer by issuing a new

certificate; for any person who took the new certificate, even though he was a bona fide purchaser for value, would not get any stock in the corporation, if all authorized stock had previously been issued. The corporation has no power to over-issue stock; it cannot emit any more even if it tries, and therefore the purchaser gets no stock. He does, however, get a right against the corporation. The corporation has issued what purports to be new stock to him, or if he is a remote purchaser he has paid for stock in reliance on a certificate which the corporation has issued. The corporation is estopped, as the legal phrase is, to deny the validity of that certificate as against one who has thus relied on its acts. The result is that the corporation is bound to pay to him value equivalent to that of real stock, because the corporation has put out something which seems to be good stock, and owing to the act of the corporation, the purchaser has been deceived.

FORGED ASSIGNMENTS.—A second legal difficulty arises where the indorsement or assignment of the certificate is forged. Only the owner of the stock can sell it. Consequently, if anybody else attempts by forgery or otherwise to make a transfer, the transfer will be be ineffectual. The result will be the same as though the whole certificate were forged. The purchaser under the forged indorsement will get nothing. If the corporation relies on the forged indorsement and issues a new certificate, it will, in the same way as in the case of a new certificate issued for a wholly forged one, be liable to a purchaser for value.

It is, of course, of vital importance, therefore, to make sure that indorsements are correct, and generally it is desirable to take indorsed certificates only from reliable persons. If you take such a certificate from a reliable person, even though there is no express guaranty of signatures by a brokerage house or other third person, as there often is, you will be practically safe because of the implied warranty of genuineness by the seller which applies to the indorsement on certificates as well as to cases of wholly forged certificates.

ASSIGNMENTS BY UNAUTHORIZED AGENT.—A third case is where the indorsement is made by an agent, and the agent has no authority to act. A corporation transferring stock should require, and a purchaser should require, the clearest evidence of an agent's authority if the signature of the transferor is made by an agent. It is not only necessary to be sure that the agent's authority originally existed, but it is necessary to be sure that his power has not been revoked, either by the death of the principal or by express revocation during his life. A question that sometimes is troublesome, in regard to the agent's authority to make such an indorsement, arises where the terms of the power given the agent are general; where he is authorized to do a very broad class of acts for the principal, but no specific mention is made of the particular certificate which he seeks to transfer. Such a power, if it certainly includes the transfer of that certificate, is legally good, but a corporation would object to make a transfer under a power which did not specifically mention the particular certificate, un-

less it was absolutely certain from its terms that the certificate in question was included.

LACK OF CAPACITY TO ASSIGN.—A fourth case is lack of capacity on the part of the owner of the stock to make a transfer. This lack of capacity may arise from a variety of causes, insanity or infancy, for instance. A totally insane person is as incapable of transferring stock as of transferring other property. An infant, that is, a minor, though not wholly without capacity if not under guardianship, becomes, presumably, wholly without capacity to transfer stock if under guardianship. An elderly person under the charge of a conservator would be incapacitated to transfer his property. An infant who has had no guardian appointed, though he could make a transfer, by virtue of his infant's privilege, may revoke that transfer, which, therefore, would be too insecure either for a purchaser to take or for a corporation to allow. If stock is owned by an infant, a purchaser or a corporation should require that a guardian be appointed and that the transfer be made by the guardian.

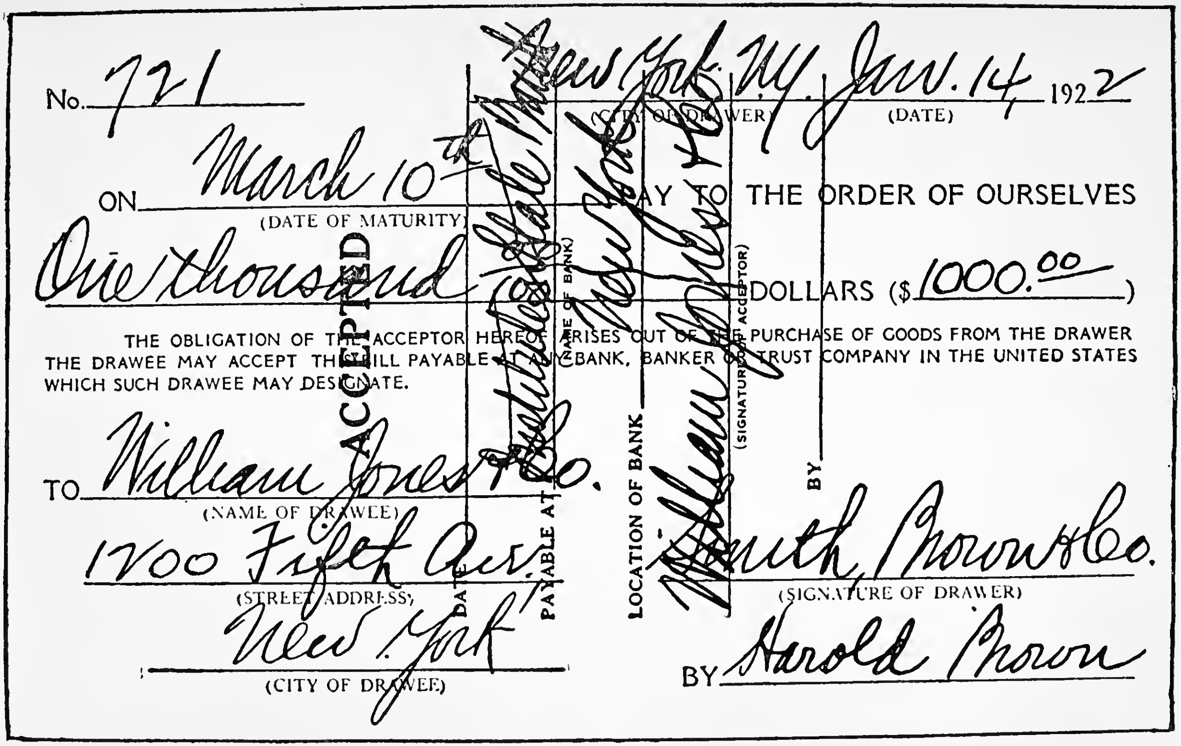
LACK OF DELIVERY; THEFT OF CERTIFICATE.—A fifth case arises where the signature on the back of the certificate of stock is genuine, but where there has been no valid delivery by the owner. This is rather a troublesome case to detect. In the case of full negotiable instruments, like bills and notes, if the signature of an indorser is genuine, a purchaser for value of the instrument will get title even though he purchases from a thief, or though for any reason

there was no intention on the part of the owner who wrote his name on the back to make a transfer of the instrument. But by common law, stock certificates were not negotiable to this extent. This case occurred in a law office in Boston: the head of the firm rather carelessly kept "street certificates" for stock (that is, certificates made out in the name of the brokerage firm which was the former owner and indorsed in blank), not having the certificates transferred to his own name. The stock was not at the time dividend-paying, so that a transfer on the books seemed unimportant. He put the certificates into the office safe to which the office boy had access. This boy took the certificates and sold them through a broker, and the loss was not discovered for several years. After it was discovered, the loss was traced by the numbers of the certificates, and action was brought against the brokers who were unfortunate enough to have taken the stock from the office clerk. Now, if the certificates had been negotiable paper, the brokers would not have been liable, but under the law then existing it seemed so probable that they were liable that they settled the case by paying more than half the value of the stock. The only thing that could have prevented their being liable was that, under the circumstances, the contention was possible that the owner of the stock had been so negligent in his dealing with the certificates as to preclude him from asserting any right. Now the Uniform Stock Transfer Act changes the law in this respect so far as Massachusetts stock certificates are concerned. The Act

makes them fully negotiable, but the common law would apparently still apply to certificates of stock of corporations incorporated in other States which have not adopted the Act. Similar principles would be applicable in other States which have passed the same statute.

THE TRADE ACCEPTANCE.—Within the last few years a concerted movement to re-introduce the trade acceptance has been made, and its use is strongly advocated by the American Bankers Association, the National Association of Credit Men, and the Chamber of Commerce of the United States. Students should turn to page 371 for the form of such a document. It will be seen to be simply a time draft drawn by the seller of goods on the purchaser and acknowledged by him on its face. To make the acceptance available for final discount with the Federal Reserve Bank, the following clause is inserted: "The obligation of the acceptor hereof arises out of the purchase of goods from the drawer." Does this phrase indicate that its payment is contingent upon the consummation of the contract between himself and the drawer? This phrase written across the face of the acceptance does not make the promise of the acceptor conditional or contingent upon the consummation of the contract between the acceptor and the drawer. It is simply a statement of the transaction which gives rise to the instrument. The Negotiable Instruments Act provides that "an unqualified order or promise to pay is unconditional within the meaning of this Act, though coupled with * * * a statement of the trans-

Trade Acceptance



No. 721

New York, N.Y. Jan. 14 1922
(CITY OF DRAWER) (DATE)

ON March 10th PAY TO THE ORDER OF OURSELVES
(DATE OF MATURITY)

One thousand DOLLARS ($1000.00)

THE OBLIGATION OF THE ACCEPTOR HEREOF ARISES OUT OF THE PURCHASE OF GOODS FROM THE DRAWER THE DRAWEE MAY ACCEPT THIS BILL PAYABLE AT ANY BANK, BANKER OR TRUST COMPANY IN THE UNITED STATES WHICH SUCH DRAWEE MAY DESIGNATE.

TO William Jones & Co.
(NAME OF DRAWEE)

1700 Fifth Ave.
(STREET ADDRESS)

New York
(CITY OF DRAWEE)

ACCEPTED

DATE

PAYABLE AT
(NAME OF BANK)

LOCATION OF BANK New York

William Jones
(SIGNATURE OF ACCEPTOR)

BY

Smith, Brown & Co.
(SIGNATURE OF DRAWER)

BY Harold Brown

action." The seller of goods sends an acceptance draft with the invoice to the buyer and the latter "accepts" by signing his name upon the face of the draft, adding the date and the place of payment. If the transactions are small and numerous, the merchant, with the monthly statement, will send an acceptance drawn for the full amount covering the various transactions for that month. The buyer then either pays the bill in cash, deducting the cash discount allowed, or he accepts the draft, and within ten days returns it to the seller. If the acceptor can obtain a better rate than can the drawer for discounting the acceptance, the former, with the consent of the drawer, may discount the acceptance with his own bank. Ordinarily, the acceptance is returned to the drawer, who in turn may carry it to maturity or discount it with his bank, possibly at a lower rate than he would pay upon his own single-name paper. Thus the seller's open accounts readily become realizable, enabling him to do a larger and safer business than were he confined to his present methods. His capital locked up in open accounts is released and the benefits derived can be, and in most instances are, shared with his customers. The acceptor has foregone nothing in accepting the draft. None of his legal rights as to subsequent claims for shortages of goods, etc., are waived, though of course the acceptance is excellent proof, as it should be, of a completed sale and consequent obligation. It indicates the exact date of payment and fixes the precise amount due. Its use should lessen merchandise disputes and delays, there-

by lowering the cost of doing business for the seller. The buyer then pays less for his merchandise and is kept to prompt payment and from over-extension. This, of course, strengthens his credit. The acceptor's credit standing is not impaired in the slightest by giving acceptances, for acceptances cannot be given for past due accounts or mere loans, but are evidences of prompt payment of current merchandise transactions. And, as has been frequently pointed out, every buyer in turn becomes a seller; therefore in one position or the other, he may be a beneficiary of the use of acceptances.

LEGAL EFFECT OF TRADE ACCEPTANCE AND NOTE.—Does a trade acceptance have any legal advantages over a plain note which has on it the same names as maker and indorser, which a trade acceptance has as drawer and acceptor? The only difference is one of form. The legal effect of the instruments is substantially the same. Both the acceptance and the note contain a promise to make payment at maturity to the payee who is liable as indorser if the promise is not fulfilled.

LETTERS OF CREDIT.—As has been recently said by Judge Rogers of the U. S. Circuit Court of Appeals in American Steel Co. v. Irving National Bank, 266 Fed. Rep. 41: "Letters of credit have long been known to the commercial law, and the principles which govern them are well established. A letter requesting one person to make advances to a third person on the credit of the writer is a letter of credit. These letters are general or special. They are gen-

eral, if addressed to the writer's correspondents generally. They are special, if, as in the case at bar, they are addressed to some particular person. If the letter is addressed to a particular person who advances goods or money on it in accordance with its tenor, the letter becomes an available promise in favor of the person making the advance. When acted on, and the advances made in accordance with its terms, a contract is created between the writer of the letter and the party who has acted upon it, upon which an action can be maintained."

USES OF LETTERS OF CREDIT.—There are many ways in which the transfer of funds may be effected between distant cities or between persons. One of the more important methods used primarily in foreign trade is that of letters of credit. These are issued by banks. They are intended primarily for the convenience of travelers, particularly those in foreign countries. They are authorizations to the bank's correspondents to pay the bearer up to a certain named amount. Suppose A wishes to travel in Europe. He buys a letter of credit. He arrives at Paris and wishes some funds. The letter of credit gives the name of the bank's correspondent in Paris. A goes to that bank and makes out a draft for the amount he needs. The signature on the draft is compared with the signature on the letter of credit and if they correspond the money will be paid. The paying official writes down on the letter of credit the amount withdrawn plus the commission. At any time therefore, the letter will show how much of the credit remains unused. They

are of much convenience to travelers, as advancements can be secured on them almost everywhere and no identification beyond the comparison of signatures is required. Any balance that may remain when the traveler returns will be redeemed by the bank or banker which issued the letter. The commercial letter of credit (as distinguished from the traveler's letter) is used to pay for merchandise purchased from exporters in foreign countries. It authorizes an exporter to draw against the correspondents of the issuing bank for the amount named in the letter on account of specific shipments. Suppose A wishes to take a trip visiting several cities to make purchases or payments. He buys a "commercial letter of credit" upon which he will be able to raise money for his purposes at convenient points. Let us consider the case of the importer and exporter. A, living in Chicago, purchases goods from B, a merchant in Hong Kong. He goes to his Chicago bank and gets a commercial letter of credit stating the terms of his purchase. Such a letter would be addressed to some London bank probably, requesting it to "accept" the drafts of the Hong Kong merchant up to a certain amount and provided he complies with certain conditions named in the letter, concerning bills of lading, consular invoices, insurance papers, etc. The Chicago bank sends this letter to the Hong Kong merchant. After complying with the terms of the sale he draws a draft on the London bank named, attaching the papers that may be named in the letter of credit as having to accompany the draft. He takes this draft to his local bank and sells

it, the local bank of course deducting the exchange charges. The Hong Kong merchant has thus received his payment for the goods and is out of the transaction. If the London banker accepts the draft he sends it to Chicago. A, the Chicago merchant, can get the goods by signing a "trust receipt," stating he will sell the goods and use the proceeds to pay the draft. Both the importer and exporter are benefited by the transaction, the exporter getting his money when he sends the goods and the importer being able to sell the goods before he has to pay for them. If his credit had not been particularly good with his Chicago bank the latter might have stored the goods and turned them over to him only when he showed he had sold them and needed them to make delivery and get payment; or they might be parceled out to him in small lots. The Chicago bank gets a commission from A, and the London bank gets a commission for accepting the draft.

TRAVELERS' CHEQUES.—A modified form of the traveler's letter of credit is the traveler's cheque originated by the American Bankers Association, and others. The "A. B. A." cheques are of convenient size and are fastened in a handy leather wallet or pocketbook, from which they may be torn as needed. They are issued in four denominations,—\$10 (blue), \$20 (green), \$50 (straw), \$100 (orange)—and the traveler may have a book of cheques made up in any amount to suit his requirements. At the time the cheques are bought, the purchaser writes his name on the face of each one (top line on the left) and is

instructed not to countersign them (bottom line on the left) until presenting them for payment. Hotels, banks, transportation companies, and all others called upon to accept the cheques should require the holder to countersign them in the presence of the person accepting them, when the signature and the countersignature should be compared. These cheques are accepted throughout America and Europe, (under normal conditions) by hotels, railroads, steamship lines, sleeping car companies, and the principal stores and shops. They may be cashed at practically all banks, including the strongest banking institutions in all the larger cities and towns.

MAY A BANK CANCEL LETTER OF CREDIT?—"Our correspondents at Paris have requested us by cable to inform you that they open a confirmed credit in your favor * * * available against your drafts on us at sight accompanied by shipping documents." May the bank cancel such letter of credit merely upon instructions from its foreign correspondent, and leave the person in whose favor the credit was opened to his remedy against the bank's correspondent in Paris? Would the New York bank be held as would an American bank issuing a letter on its own initiative? Recent decisions are to the effect that a bank issuing a letter of credit on behalf of a depositor to a third person who acts on it cannot justify its refusal to honor its obligation because of contract relations between it and the depositor (American Steel Co. v. Irving National Bank, 266 Fed. 41); and that where a bank issues a letter of

credit at the buyer's instance, the letter of credit is irrevocable and the buyer cannot enjoin the bank from honoring or paying any drafts thereon nor can it enjoin the seller from drawing or negotiating drafts upon such letter (Frey & Son v. E. R. Sherburne & Co., 184 N.Y. Supp. 661). In the latter case the court said: "Interests of innocent parties who may hold drafts upon the letter of credit should not be made to suffer by reason of rights that may exist between the parties to the contract of sale in reference to which the letter of credit was issued." In the case submitted, the New York bank would be equally bound as if it had issued a letter of credit on its own account; it is more than a mere agent for a known principal, whose acts and contracts involve no contractual liability on the part of the agent. The bank has superadded a contract of its own to the effect that it holds a credit in favor of the person addressed and its statement that such credit is available against such person's drafts is a promise to pay the drafts drawn against the credit upon which it is personally liable. An agent may pledge his own credit in the transaction or superadd it to that of the principal in such a way as to render himself personally liable. McCauley v. Ridgewood Trust Co., 79 Atl. (N.J.) 327, Jones v. Gould, 29 N. E. (N.Y.) 1071. The Negotiable Instruments Act, Section 135, provides that "an unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value." Under the terms of this provision, the letter

of the New York bank would bind it as acceptor of drafts drawn against the credit in favor of bona fide purchasers for value. There is a certain analogy to the binding nature of a certified check, payment of which the depositor cannot stop, except as concerns the original payee, in which case the decisions are somewhat conflicting whether the bank can interpose equities of the depositor against him.. Gelpcke v. Quentell, 74 N. Y. 599, is very similar to the case submitted. In that case the New York correspondent was held justified in accepting and paying drafts drawn before notice of revocation of the letter of credit had reached the person in whose favor the credit was extended, and was held to have the right of reimbursement from its foreign correspondent. Although in this case the court seems to think that the letter was binding as an aceptance only of such drafts as were drawn before the drawer had notice of the withdrawal of the credit, later decisions seem to go further and uphold the absolute irrevocability of letters of credit, not only in favor of bona fide holders of drafts, but also in favor of the person to whom the letter is issued. The above discussion does not apply to conditional letters of credit, but only to absolute promises.

BILLS OF LADING AS NEGOTIABLE INSTRUMENTS.—Although a bill of lading is designed to pass from hand to hand with or without indorsement, it is, nevertheless, not a negotiable instrument in exactly the same sense as bills of exchange or promissory notes are. Under the Uniform Bills of Lading

Act, these documents are given full negotiability so far as it is possible to make them similar to other negotiable instruments.

THREEFOLD NATURE OF A BILL OF LADING.—A bill of lading issued by a carrier for goods has a threefold character. In the first place it is a receipt. A receipt is important as evidence of just what was shipped. It is important to the shipper as proof that the carrier received goods, of such a quantity and of such a description, in good order. It is important to the carrier as proof of the same thing, to prevent the shipper from claiming that he has shipped different kinds or quantities of goods from those described in the bill of lading. The second aspect of a bill of lading is as a contract. It is not only a receipt but a contract between the parties, the shipper and the carrier. It is as a contract that the stipulations it contains for limitation of liability are important. Third, it is an order, when properly indorsed and surrendered, for the delivery of the goods.

INDORSEMENT OF BILLS OF LADING.—Order bills of lading need, for their negotiation, indorsement by the consignee, just as a promissory note needs indorsement by the payee. But there is one difference between the indorsment of a bill of lading, it may be said in passing, and the indorsement of a promissory note. The indorser of a bill of lading incurs no liability by his indorsement. His indorsement is simply a transfer. If it turns out that the bill of lading is not honored by the carrier, the holder of an indorsed bill of lading cannot come back on the indorser in the

way that the holder of a promissory note can come back on the indorser if the maker fails to pay.

WAREHOUSE RECEIPTS ARE SIMILAR TO BILLS OF LADING.—To what has been said in regard to bills of lading a few words in regard to warehouse receipts may be added. Warehouse receipts are entirely similar in character to bills of lading, and what has been said in regard to them is, in general, applicable to warehouse receipts. There is a Uniform Warehouse Receipts Act which is similar in its provisions to the Uniform Bills of Lading Act, and the Warehouse Receipts Act has been enacted in a majority of the States. Warehouse receipts may be, in form, order or straight. They are simpler in form, ordinarily, than bills of lading, because they do not have so many special stipulations and conditions, but in other respects they are practically identical. The risks that one who deals in them runs are the same in their nature as in the case of bills of lading. There is one circumstance, however, in regard to warehouse receipts that gives one a better chance to protect himself than in the case of bills of lading. Warehouse receipts are generally used as collateral and for purchase and sale in the city where the goods are stored. It is therefore possible to telephone to the warehouseman or otherwise to assure oneself of the existence of the goods in a way that is not possible under the bill of lading, where the goods are in transit. The warehouse receipt, even less than a bill of lading, has a day of maturity. A bill of lading, as we have seen, has no particular day on which it is evident to a pur-

chaser that it has finished its work, and that is even more true of a warehouse receipt. The fact that a warehouse receipt is pretty old does not necessarily show that the document is not a perfectly good document and that the goods are not there

UNIFORM LAWS.—Reference should be made to the Uniform Acts which have been adopted in most of the States on the topics covered in this chapter. The most important provisions affecting negotiability in these Acts will be found in a later chapter—the Uniform Stock Transfer Act, page 397, the Uniform Bills of Lading Act, page 390, and the Uniform Warehouse Receipts Act, page 383.

CHAPTER XV.

Miscellaneous

THERE are several sections of various uniform acts which relate to negotiability. So that the student may have these provisions clearly in mind as he studies the Negotiable Instruments Law, these several sections are presented in full in this chapter:

Uniform Warehouse Receipts Act

Sec. 2. FORM OF RECEIPTS—ESSENTIAL TERMS.—Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms—

(a) The location of the warehouse where the goods are stored.

(b) The date of issue of the receipt.

(c) The consecutive number of the receipt.

(d) A statement whether the goods received will be delivered to the bearer, or to a specified person, or to a specified person or his order.

(e) The rate of storage charges.

(f) A description of the goods or of the packages containing them.

(g) The signature of the warehouseman, which may be made by his authorized agent.

(h) If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly

or in common with others, the fact of such ownership; and,

(i) In the case of a negotiable receipt, a statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.

A warehouseman shall be liable to any person injured thereby for all damages caused by the omission from a negotiable receipt of any of the terms herein required.

Sec. 3. FORM OF RECEIPTS — WHAT TERMS MAY BE INSERTED.—A warehouseman may insert in a receipt issued by him any other terms and conditions, provided that such terms and conditions shall not—

(a) Be contrary to the provisions of this act.

(b) In any wise impair his obligation to exercise that degree of care in the safe-keeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own.

Sec. 4. DEFINITION OF NON-NEGOTIABLE RECEIPT.—A receipt in which it is stated that the goods received will be delivered to the depositor or to any other specified person, is a non-negotiable receipt.

Sec. 5. DEFINITION OF NEGOTIABLE RECEIPT.—A receipt in which it is stated that the goods received will be delivered to the bearer, or to the order of any person named in such receipt is a negotiable receipt.

No provision shall be inserted in a negotiable receipt that it is non-negotiable. Such provisions, if inserted, shall be void.

Sec. 7. FAILURE TO MARK "NOT NEGOTIABLE."—A non-negotiable receipt shall have plainly placed upon its face by the warehouseman issuing it "Non-negotiable" or "Not negotiable." In case of the warehouseman's failure so to do, a holder of the receipt who purchased it for value supposing it to be negotiable, may at his option treat such receipt as imposing upon the warehouseman the same liabilities he would have incurred had the receipt been negotiable.

This section shall not apply, however, to letters, memoranda, or written acknowledgments of an informal character.

Sec. 11. NEGOTIABLE RECEIPTS MUST BE CANCELED WHEN GOODS DELIVERED.—Except as provided in Section 36, where a warehouseman delivers goods for which he had issued a negotiable receipt, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the receipt, he shall be liable to anyone who purchases for value in good faith such receipt for failure to deliver the goods to him, whether such purchaser acquired title to the re-

ceipt before or after the delivery of the goods by the warehouseman.

Sec. 12. NEGOTIABLE RECEIPTS MUST BE CANCELED OR MARKED WHEN PART OF GOODS DELIVERED.—Except as provided in Sec. 36, where a warehouseman delivers part of the goods for which he had issued a negotiable receipt and fails either to take up and cancel such receipt, or to place plainly upon it a statement of what goods or packages have been delivered he shall be liable to anyone who purchases for value in good faith such receipt, for failure to deliver all the goods specified in the receipt, whether such purchaser acquired title to the receipt before or after the delivery of any portion of the goods by the warehouseman.

Sec. 37. NEGOTIATION OF NEGOTIABLE RECEIPTS BY DELIVERY.—A negotiable receipt may be negotiated by delivery—

(a) Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the bearer, or

(b) Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the receipt has indorsed it in blank or to bearer.

(c) Where, by the terms of a negotiable receipt, the goods are deliverable to bearer or where a negotiable receipt has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the re-

ceipt shall thereafter be negotiated only by the indorsement of such indorsee.

Sec. 38. NEGOTIATION OF NEGOTIABLE RECEIPTS BY INDORSEMENT.—A negotiable receipt may be negotiated by the indorsement of the person to whose order the goods are, by the terms of the receipt, deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.

Sec. 39. TRANSFER OF RECEIPTS.—A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee.

A non-negotiable receipt cannot be negotiated, and the indorsement of such receipt gives the transferee no additional right.

Sec. 40. WHO MAY NEGOTIATE A RECEIPT.—A negotiable receipt may be negotiated—

(a) By the owner thereof;

(b) By any person to whom the possession or custody of the receipt has been intrusted by the owner, if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of the person to whom the possession or custody of the receipt has been intrusted, or if at the time of such intrusting, the receipt be in such form that it may be negotiated by delivery.

Sec. 41. RIGHTS OF PERSON TO WHOM A

RECEIPT HAS BEEN NEGOTIATED.—A person to whom a negotiable receipt has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the receipt to him had or had ability to convey to the purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value;

(b) The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him.

Sec. 42. RIGHTS OF PERSON TO WHOM A RECEIPT HAS BEEN TRANSFERRED.—A person to whom a receipt has been transferred but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If the receipt be non-negotiable, such person also acquires the right to notify the warehouseman of the transfer to him of such receipt, and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt.

Prior to the notification of the warehouseman by the transferor or transferee of a non-negotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an attachment or exe-

cution upon the goods by a creditor of the transferor, or by a notification to the warehouseman by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

Sec. 43. TRANSFER OF NEGOTIABLE RECEIPT WITHOUT INDORSEMENT.—Where a negotiable receipt is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the receipt, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

Sec. 47. WHEN NEGOTIATION NOT IMPAIRED BY FRAUD, MISTAKE OR DURESS. —The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was induced by fraud, mistake, or duress to intrust the possession or custody of the receipt to such person, if the person to whom the receipt was negotiated, or a person to whom the receipt was subsequently negotiated, paid value therefor, without notice of the breach of duty or fraud, mistake or duress.

Sec. 48. SUBSEQUENT NEGOTIATION.—Where a person having sold, mortgaged, or pledged goods which are in a warehouse and for which a negotiable receipt has been issued, or having sold, mortgaged, or pledged the negotiable receipt representing

such goods, continues in possession of the negotiable receipt, the subsequent negotiation thereof by that person under any sale, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, mortgage or pledge, shall have the same effect as if the first purchaser of the goods or receipt had expressly authorized the subsequent negotiation.

Uniform Bills of Lading Act

Sec. 2. FORM OF BILLS — ESSENTIAL TERMS.—Every bill must embody within its written or printed terms—

(a) The date of its issue;

(b) The name of the person from whom the goods have been received;

(c) The place where the goods have been received;

(d) The place to which the goods are to be transported;

(e) A statement whether the goods received will be delivered to a specified person, or to the order of a specified person;

(f) A description of the goods or of the packages containing them which may, however, be in such general terms as are referred to in Sec. 23, and,

(g) The signature of the carrier.

A negotiable bill shall have the words "order of" printed thereon immediately before the name of the person upon whose order the goods received are deliverable.

A carrier shall be liable to any person injured thereby for the damage caused by the omission from a negotiable bill of any of the provisions required in this section.

Sec. 4. DEFINITION OF NON-NEGOTIABLE OR STRAIGHT BILL.—A bill in which it is stated that the goods are consigned or destined to a specified person, is a non-negotiable or straight bill

Sec. 5. DEFINITION OF NEGOTIABLE OR ORDER BILL.—A bill in which it is stated that goods are consigned or destined to the order of any person named in such bill, is a negotiable or order bill.

Any provision in such a bill that is non-negotiable shall not affect its negotiability within the meaning of this act.

Sec. 6. NEGOTIABLE BILLS MUST NOT BE ISSUED IN SETS.—Negotiable bills issued in this State for the transportation of goods to any place in the United States on the continent of North America, except Alaska, shall not be issued in parts or sets. If so issued, the carrier issuing them shall be liable for failure to deliver the goods described therein to anyone who purchases a part for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts.

Sec. 7. DUPLICATE NEGOTIABLE BILLS MUST BE SO MARKED.—When more than one negotiable bill is issued in this state for the same goods to be transported to any place in the United

States on the continent of North America, except Alaska, the word "duplicate" or some other word or words indicating that the document is not an original bill shall be placed plainly upon the face of every such bill, except the one first issued. A carrier shall be liable for the damage caused by his failure so to do to anyone who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill.

Sec. 8. NON-NEGOTIABLE BILLS SHALL BE SO MARKED.—A non-negotiable bill shall have placed plainly upon its face by the carrier issuing it "non-negotiable," or "not negotiable." This section shall not apply, however, to memoranda or acknowledgments of an informal character.

Sec. 14. NEGOTIABLE BILLS MUST BE CANCELED WHEN GOODS DELIVERED.—Except as provided in section 27, and except when compelled by legal process, if a carrier delivers goods for which a negotiable bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after delivery of the goods by the carrier, and notwithstanding delivery was made to the person entitled thereto.

Sec. 15. NEGOTIABLE BILLS MUST BE CANCELED OR MARKED WHEN PARTS OF

GOODS DELIVERED.—Except as provided in Sec. 27, and except when compelled by legal process, if a carrier delivers part of the goods for which a negotiable bill had been issued and fails either—

(a) To take up and cancel the bill, or

(b) To place plainly upon it a statement that a portion of the goods has been delivered, with a description, which may be in general terms, either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carrier's possession, he shall be liable for failure to deliver all the goods specified in the bill, to anyone who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto.

Sec. 28. NEGOTIATION OF NEGOTIABLE BILLS BY DELIVERY.—A negotiable bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the bill has indorsed it in blank.

Sec. 30. TRANSFER OF BILLS.—A bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby.

A non-negotiable bill cannot be negotiated, and the indorsement of such a bill gives the transferee no additional rights.

Sec. 31. WHO MAY NEGOTIATE A BILL. —A negotiable bill may be negotiated by any person in possession of the same, however such possession may have been acquired if, by the terms of the bill, the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery.

Sec. 32. RIGHTS OF PERSON TO WHOM A BILL HAS BEEN NEGOTIATED.—A person to whom a negotiable bill has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value; and

(b) The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him.

Sec. 33. RIGHTS OF PERSON TO WHOM A BILL HAS BEEN TRANSFERRED.—A person to whom a bill has been transferred but not negotiated acquires thereby as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor. If the bill is non-negotiable, such person also acquires the right to notify the carrier of the transfer to him of such bill, and thereby to become the direct obligee of whatever obliga-

tions the carrier owed to the transferor of the bill immediately before the notification.

Prior to the notification of the carrier by the transferor or transferee of a non-negotiable bill, the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

A carrier has not received notification within the meaning of this section unless an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a notification, has been notified; and no notification shall be effective until the officer or agent to whom it is given has had time with the exercise of reasonable diligence to communicate with the agent or agents having actual possession or control of the goods.

Sec. 34. TRANSFER OF NEGOTIABLE BILL WITHOUT INDORSEMENT.—Where a negotiable bill is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the bill, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced.

Sec. 35. WARRANTIES ON SALE OF BILL.

—A person who negotiates or transfers for value a bill by indorsement or delivery, including one who assigns for value a claim secured by a bill, unless a contrary intention appears, warrants—

(a) That the bill is genuine;

(b) That he has a legal right to transfer it;

(c) That he has knowledge of no fact which would impair the validity or worth of the bill, and

(d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a bill the goods represented thereby.

In case of an assignmnet of a claim secured by a bill, the liability of the assignor shall not exceed the amount of the claim.

Sec. 36. INDORSER NOT A GUARANTOR. —The indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorsers of the bill to fulfill their respective obligations.

Sec. 38. WHEN NEGOTIATION NOT IMPAIRED BY FRAUD, ACCIDENT, MISTAKE, DURESS OR CONVERSION.—The validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress, loss, theft, or conversion, if the person to whom the

bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress, loss, theft, or conversion.

Sec. 39. SUBSEQUENT NEGOTIATION.—Where a person having sold, mortgaged, or pledged goods which are in a carrier's possession and for which a negotiable bill has been issued, or having sold, mortgaged, or pledged the negotiable bill representing such goods, continued in possession of the negotiable bill, the subsequent negotiation thereof by that person under any sale, pledge, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation.

Uniform Stock Transfer Act

THE UNIFORM STOCK TRANSFER ACT.

1. Title to a certificate and to the shares represented thereby can be transferred only:

(a) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or

(b) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign or transfer the same or the shares represented thereby,

signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.

The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself, provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent.

5. The delivery of a certificate to transfer title in accordance with the provisions of section one, is effectual, except as provided in section seven, though made by one having no right of possession and having no authority from the owner of the certificate or from the person purporting to transfer the title.

6. The indorsement of a certificate by the person appearing by the certificate to be the owner of the shares represented thereby is effectual, except as provided in section seven, though the indorser or transferor,

(a) Was induced by fraud, duress or mistake, to make the indorsement or delivery, or

(b) Has revoked the delivery of the certificate, or the authority given by the indorsement or delivery of the certificate, or

(c) Has died or become legally incapacitated after the indorsement, whether before or after the delivery of the certificate, or

(d) Has received no consideration.

7. If the indorsement or delivery of a certificate,

(a) Was procured by fraud or duress, or

(b) Was made under such mistake as to make the indorsement or delivery inequitable; or

If the delivery of a certificate was made

(c) Without authority from the owner, or

(d) After the owner's death or legal incapacity, the possession of the certificate may be reclaimed and the transfer thereof rescinded, unless:

(1) The certificate has been transferred to a purchaser for value in good faith without notice of any facts making the transfer wrongful, or

(2) The injured person has elected to waive the injury, or has been guilty of laches in endeavoring to enforce his rights.

Any court of appropriate jurisdiction may enforce specifically such right to reclaim the possession of the certificate or to rescind the transfer thereof and, pending litigation, may enjoin the further transfer of the certificate or impound it.

8. Although the transfer of a certificate or of shares represented thereby has been rescinded or set aside, nevertheless, if the transferee has possession of the certificate or of a new certificate representing part or the whole of the same shares of stock, a subsequent transfer of such certificate by the transferee, mediately or immediately, to a purchaser for value in good faith, without notice of any facts making the transfer wrongful, shall give such purchaser an indefeasible

right to the certificate and the shares represented thereby.

9. The delivery of a certificate by the person appearing by the certificate to be the owner thereof without the indorsement requisite for the transfer of the certificate and the shares represented thereby, but with intent to transfer such certificate or shares, shall impose an obligation, in the absence of an agreement to the contrary, upon the person so delivering, to complete the transfer by making the necessary indorsement. The transfer shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced.

10. An attempted transfer of title to a certificate or to the shares represented thereby without delivery of the certificate shall have the effect of a promise to transfer, and the obligation, if any, imposed by such promise shall be determined by the law governing the formation and performance of contracts.

11. A person who for value transfers a certificate, including one who assigns for value a claim secured by a certificate, unless a contrary intention appears, warrants—

(a) That the certificate is genuine;

(b) That he has a legal right to transfer it, and

(c) That he has no knowledge of any fact which would impair the validity of the certificate.

In the case of an assignment of a claim secured by a certificate, the liability of the assignor upon such warranty shall not exceed the amount of the claim.

Negotiable Instruments Act

Title I—Negotiable Instruments In General

ARTICLE I.—FORM AND INTERPRETATION

Section 1. Be it enacted, etc., An instrument to be negotiable must conform to the following requirements—

1. It must be in writing and signed by the maker or drawer;

2. Must contain an unconditional promise or order to pay a sum certain in money;

3. Must be payable on demand, or at a fixed or determinable future time;

4. Must be payable to order or to bearer; and,

5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

In Georgia the words "provided that a promissory note may be made payable in cotton or other articles of value" is added to subsection 2.

In Illinois the words "payable in money" are inserted after the word "instrument" in the first sentence of the section.

In Michigan the words "Certain sum" appear instead of "sum certain."

Section 4 of the act as adopted in Arizona, Idaho, Iowa, Kentucky, North Carolina and Wyoming reads: "Must be payable to the order of a specified person, or to bearer," but "specified person" is surplusage.

Sec. 2. The sum payable is a sum certain within the meaning of this act, although it is to be paid—

The pages of the text referring to the various sections of the Negotiable Instruments Act have been noted at the foot of each page of the Act, as follows:

Sec. 1—23, 36, 40, 43, 44.

Sec. 2.—47, 48.

1. With interest; or

2. By stated instalments; or

3. By stated instalments, with a provision that upon default in payment of any instalment or of interest the whole shall become due; or

4. With exchange, whether at a fixed rate or at the current rate; or

5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

In Idaho, Iowa, North Carolina and Wyoming the words "Or of interest" in subsection 3 are omitted.

Nebraska adds: "Provided that nothing herein contained shall be construed to authorize any court to include in any judgment on an instrument made in this State any sum for attorney's fees or other costs not allowable in other cases."

North Carolina adds: "Nothing in this chapter shall authorize the enforcement of an authorization to confess judgment or a waiver of homestead and personal property exemptions or a provision to pay counsel fees for collection incorporated in any of the instruments mentioned in this chapter; but the mention of such provisions in such instruments shall not affect the other terms of such instruments or the negotiability thereof."

South Dakota substitutes for subsection 5: "Provided that nothing herein contained shall be construed to authorize any court to include in any judgment or instrument made in this State any sum for attorney's fees, or other costs not now taxable by law."

Sec. 3. An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with—

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or

2. A statement of the transaction which gives rise to the instrument.

Sec. 3.—24, 28, 49, 50, 370.

But an order or promise to pay out of a particular fund is not unconditional.

Sec. 4. An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable—

1. At a fixed period after date or sight; or

2. On or before a fixed or determinable future time specified therein; or

3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

Wisconsin substitutes for the last paragraph: "(4) At a fixed period after the date or sight, though payable before then on a contingency. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect, except as herein provided."

Sec. 5. An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which—

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or

2. Authorizes a confession of judgment if the instrument be not paid at maturity; or

3. Waives the benefit of any law intended for the advantage or protection of the obligor; or

Sec. 4.—40, 43.
Sec. 5.—44, 54, 55.

4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal.

Kansas adds to subsection 1: "Or in case the security should depreciate in value, or in case the holder for reasonable cause deems himself insecure." The following new subsection, numbered subsection 5, is also added: "Provisions or agreements in concurrent writings or mortgages given to secure payment of such instruments."

North Carolina qualifies subsection 2 (See reference under Section 2.) Georgia omits subsection 2.

Illinois adds: "under this Act" at the end of the first sentence and omits "if the instrument be not paid at maturity," in subsection 2.

Kentucky omits subsection 3.

Illinois and Wisconsin add to the last paragraph: "Or authorize the waiver of exemptions from execution."

Sec. 6. The validity and negotiable character of an instrument are not affected by the fact that—

1. It is not dated; or

2. Does not specify the value given, or that any value has been given therefor; or

3. Does not specify the place where it is drawn or the place where it is payable; or

4. Bears a seal; or

5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

Illinois begins subsection 5 "Is payable in currency or current funds: or" and omits last paragraph of subsection.

Sec. 6.—23, 24, 27, 33, 36, 37, 39, 51, 59, 61, 98.

Sec. 7. An instrument is payable on demand—

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or

2. In which no time for payment is expressed.

Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand.

Sec. 8. The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of—

1. A payee who is not maker, drawer, or drawee; or
2. The drawer or maker; or
3. The drawee; or
4. Two or more payees jointly; or
5. One or some of several payees; or
6. The holder of an office for the time being.

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.

The Illinois Act incorporates, after subsection 6: "(7) An instrument payable to the estate of a deceased person shall be deemed payable to the order of the administrator or executor of his estate."

Sec. 9. The instrument is payable to bearer—

1. When it is expressed to be so payable; or

2. When it is payable to a person named therein or bearer; or

Sec. 7.—44, 62, 63.
Sec. 8.—44, 63, 64, 65.
Sec. 9.—44, 45, 66, 67, 105.

3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or

4. When the name of the payee does not purport to be the name of any person; or

5. When the only or last indorsement is an indorsement in blank.

Illinois substitutes for subsection 3: "(3) When it is payable to the order of a person known by the drawer or maker to be fictitious or non-existent, or of a living person not intended to have any interest in it," and for subsection 5: "(5) When although originally payable to order, it is indorsed in blank by the payee or a subsequent indorsee."

Sec. 10. The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

The Alabama, Idaho, Iowa, North Carolina and Wyoming Acts add the word "negotiable" between "The" and "instrument."

Wisconsin adds: "Memoranda upon the face or back of the instrument, whether signed or not, material to the contract, if made at the time of delivery, are part of the instrument and parol evidence is admissible to show the circumstances under which they were made."

Sec. 11. Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance, or indorsement as the case may be.

Sec. 12. The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent

Sec. 10.—35.
Sec. 11.—60, 69, 156.
Sec. 12.—60, 70, 1C1, 315.

purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

The Missouri Act reads "valid" instead of "invalid"—undoubtedly a clerical error.

Sec.13. Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.

Sec. 14. Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all pur-

Sec. 13.—60, 70, 71, 97.
Sec. 14.—70, 71, 97, 98.

poses in his hand, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

The Illinois Act inserts "issued or" before "negotiated" in last sentence.

Wisconsin inserts "prior to negotiation" before "by filling." Wisconsin omits "prima facie" before "authority to fill."

Kentucky uses "negotiable" instead of "negotiated" in last paragraph—clerical error probably.

South Dakota substitutes the following for this section: "One who makes himself a party to an instrument intended to be negotiable, but which is left wholly or partly in blank, for the purpose of filling afterwards, is liable upon the instrument to an indorsee thereof in due course, in whatever manner and at whatever time it may be filled, so long as it remains negotiable in form."

Sec. 15. Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

Wisconsin substitutes "negotiation" for "delivery" at the end of the section.

Sec. 16. Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and

Sec. 15.—21, 71, 97, 141, 146.
Sec. 16.—21, 120, 160, 141, 143, 146, 147.

not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

North Carolina omits "accepting" in the second sentence.
Kansas omits the third sentence.

South Dakota omits the third sentence beginning "but" and ending "presumed" and substitutes: "An indorsee of a negotiable instrument in due course, acquires an absolute title thereto, so that it is valid in his hands, notwithstanding any provision of law making it generally void or voidable and notwithstanding any defect in the title of the person from whom he acquired it."

Sec. 17. Where the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply—

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount;

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;

3. Where the instrument is not dated, it will be

Sec. 17.—20, 72, 74, 75, 190, 330.

considered to be dated as of the time it was issued;

4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election;

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;

7. Where an instrument containing the words, "I promise to pay," is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

The Wisconsin Act adds: "(8) Where several writings are executed at or about the same time, as parts of the same transactions, intended to accomplish the same object, they may be construed as one and the same instrument as to all parties having notice thereof."

Sec. 18. No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

Wyoming omits the word "expressly" in the first sentence.

Sec. 19. The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

Sec. 18.—74, 129.
Sec. 19.—74, 76.

Kentucky substitutes: "The signature of any party may be made by an agent duly authorized in writing."

Sec. 20. Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

Virginia inserts "without disclosing his principal" after "Capacity."

Sec. 21. A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.

Illinois omits "only" after "bound."

Sec. 22. The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.

In North Carolina the words "or married woman" were inserted after "infant" in both places and the section was transferred to the article entitled "Indorsements."

Sec. 23. When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge there-

Sec. 20.—74, 76, 77.
Sec. 21.—76, 77.
Sec. 22.—133, 154.
Sec. 23.—19, 175.

for, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.

Illinois omits "of the person whose signature it purports to be."

ARTICLE II. CONSIDERATION

Sec. 24. Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.

Sec. 25. Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.

Wisconsin inserts "discharged, extinguished or extended" after the word "debt" and adds the following: "But the indorsement or delivery of negotiable paper as collateral security for a pre-existing debt, without other consideration, and not in pursuance of an agreement at the time of delivery, by the maker, does not constitute value."

Illinois inserts after "value" in the second sentence: "where an instrument is taken either in satisfaction therefor or as security therefor."

Sec. 26. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

Sec. 27. Where the holder has a lien on the in-

Sec. 24.—82, 86, 90.
Sec. 25.—82, 85, 87.
Sec. 26.—88, 89.
Sec. 27.—89, 90.

strument, arising either from contract or by implication of law, he is deemed a holder for a value to the extent of his lien.

Sec. 28. Absence or failure of consideration is matter of defence as against any person not a holder in due course; and partial failure of consideration is a defence pro tanto, whether the failure is an ascertained and liquidated amount or otherwise.

Sec. 29. An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

Illinois omits: "without receiving value therefor" and adds at the end of the section "and in case a transfer after maturity was intended by the accommodating party notwithstanding such holder acquired title after maturity."

ARTICLE III. NEGOTIATION

Sec. 30. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

Sec. 31. The indorsement must be written on

Sec. 28.—20, 21, 82, 90, 162.
Sec. 29.—92, 161.
Sec. 30.—105, 106.
Sec. 31.—106, 108, 111.

the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

Illinois adds: "and the addition of words of assignment or guaranty shall not negative the additional effect of the signature as an indorsement, unless otherwise expressly stated."

Sec. 32. The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.

Sec. 33. An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.

Arkansas uses "instrument" instead of "indorsement"—a probable clerical error.

Sec. 34. A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

The Massachusetts Act substitutes: "does not specify any indorsee" for "specifies no indorsee."

The Wyoming Act inserts "made" between "be" and "payable."

Sec. 32.—109.
Sec. 33.—108, 110.
Sec. 34.—108, 111, 112, 148.

Sec. 35. The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

Sec. 36.—An indorsement is restrictive, which either—

1. Prohibits the further negotiation of the instrument, or

2. Constitutes the indorsee the agent of the indorser; or

3. Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

Sec. 37. A restrictive indorsement confers upon the indorsee the right—

1. To receive payment of the instrument;

2. To bring any action thereon that the indorser could bring;

3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

Illinois adds to subsection 2: "or except in the case of a restrictive indorsement specified in section 36, subsection 2, any action against the indorser or any prior party that a special indorsee would be entitled to bring." Subsection 3 reads: (3) "To transfer the instrument, where the form of the indorsement authorizes him to do so" and at the end of the section is added: "specified in section 36, subsection 1, and as against the principal or cestui que trust only the title of the first in-

Sec. 35.—113, 148.
Sec. 36.—112, 114, 115, 116.

dorsee under the restrictive indorsement specified in section 36, subsections 2 and 3, respectively."

Sec. 38. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse," or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

In Michigan the Act reads: "Such an instrument" instead of "such an indorsement"—probably an error.

Sec. 39. Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

Sec. 40. Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

Illinois uses: "originally payable to or indorsed specially to bearer" instead of "payable to bearer."

Sec. 41. Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

Wisconsin inserts "joint" before "indorsees."

Sec. 38.—117, 118.
Sec. 39.—119.
Sec. 40.—67, 123.
Sec. 41.—124.

Sec. 42. Where an instrument is drawn or indorsed to a person as "Cashier" or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.

The South Dakota Act omits "the indorsement of" before "the bank."

Sec. 43. Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.

Sec. 44. Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

Sec. 45. Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue.

Sec. 46. Except where the contrary appears, every indorsement is presumed prima facie to have been made at the place where the instrument is dated.

Sec. 47. An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

Sec. 42.—125, 129.
Sec. 43.—125, 126, 130.
Sec. 44.—125, 130.
Sec. 45.—131.
Sec. 46.—131.
Sec. 47.—134.

Sec. 48.—The holder may at any time strike out any indorsement which is not necessary to his title. (a) The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

Kentucky substitutes "owner" for "holder" in the first line—probably an oversight.

Sec. 49. Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

The Illinois and Missouri Acts, after "right," continue as follows: "to enforce the instrument against one who signed for the accommodation of his transferor, and the right to have the indorsement of the transferor, if omitted by accident or mistake. But for the purpose of determining," etc.

Colorado inserts "if omitted by mistake, accident or fraud" at the end of the first sentence.

Wisconsin adds at the end of the section: "When the indorsement was omitted by mistake, or there was an agreement to indorse made at the time of the transfer, the indorsement, when made, relates back to the time of transfer."

The Alabama Act substitutes "said holder" for "transferor," and adds "for the purpose of transferring title only" after "transferor."

Sec. 50. Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the

Sec. 48.—134.
Sec. 49.—135, 178, 259.
Sec. 50.—137.

same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

ARTICLE IV.—RIGHTS OF THE HOLDER

Sec. 51. The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.

Sec. 52. A holder in due course is a holder who has taken the instrument under the following conditions—

1. That it is complete and regular upon its face;
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;
3. That he took it in good faith and for value;
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

Wisconsin adds: "5. That he took it in the usual course of business."

Sec. 53. Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

Sec. 54. Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be

Sec. 51.—95.
Sec. 52.—22, 95, 96, 99, 100, 103, 142, 204.
Sec. 54.—20.

deemed a holder in due course only to the extent of the amount theretofore paid by him.

Sec. 55. The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

Wisconsin adds at the end of the section: "And the title of such person is absolutely void when such instrument or signature was so procured from a person who did not know the nature of the instrument and could not have obtained such knowledge by the use of ordinary care."

The Kansas Act says "alleged consideration"— a clerical error.

Sec. 56. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

Sec. 57. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defences available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

Illinois inserts, after "themselves," a statement to the effect that defences of fraud, circumvention and gaming are ex-

Sec. 55.—20, 21, 156, 157, 158, 159.
Sec. 56.—20, 99, 154, 169.
Sec. 57.—20, 96, 170.

cepted, such defences having been made absolute defences by local statutes.

Wisconsin adds: "except as provided in sections 1944 and 1945, of the statutes relating to insurance premiums and also in cases where the title of the person negotiating such instrument is void under the provisions of section 1676—25 (N. I. L. section 55) of this Act."

Sec. 58. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defences as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

Illinois and Wisconsin insert "duress" after "fraud," and substitute "such holder" for "the latter."

The North Dakota Act, through the Compilation of 1913, substitutes "holder" for "latter."

Sec. 59. Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

ARTICLE V.—LIABILITIES OF PARTIES

Sec. 60. The maker of a negotiable instrument by making it engages that he will pay it according to

Sec. 58.—19, 96, 101, 152, 156, 158, 171.
Sec. 59.—100, 101, 102.
Sec. 60.—173, 175.

its tenor, and admits the existence of the payee and his then capacity to indorse.

Sec. 61. The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.

Colorado and Illinois omit "subsequent" before "indorser." The District of Columbia, North Dakota and New York Acts all substitute "accepted and paid" for "accepted or paid."

Sec. 62. The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits—

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and

2. The existence of the payee and his then capacity to indorse.

Missouri omits "then" before "capacity" in subsection 2.

Sec. 63. A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

Sec. 61.—175, 177, 314.
Sec. 62.—174, 175.
Sec. 63.—75, 178, 184.

Sec. 64. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser, in accordance with the following rules—

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

In the Illinois Act subsection 1 and 2 read as follows:

"1. If the instrument is a note or bill payable to the order of a third person, or an accepted bill, payable to the order of the drawer, he is liable to the payee and to all subsequent parties.

"2. If the instrument is a note or unaccepted bill payable to the order of the maker or drawer, or payable to bearer, he is liable to all parties subsequent to the maker or drawer."

Sec. 65. Every person negotiating an instrument by delivery or by a qualified indorsement, warrants—

1. That the instrument is genuine and in all respects what it purports to be;

2. That he has a good title to it;

3. That all prior parties had capacity to contract;

4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

Sec. 64.—75, 183, 185.
Sec. 65.—75, 118, 138, 180, 181, 182.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.

The provisions of subdivision three of this section do not apply to persons negotiating public or corporation securities, other than bills and notes.

Sec. 66. Every indorser who indorses without qualification, warrants to all subsequent holders in due course—

1. The matters and things mentioned in subdivisions one, two and three of the next preceding section; and

2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

The Illinois Act inserts: "not an accommodating party" after "indorser" in line 1, and "and four" after "three" in subsection 1. It also substitutes "every indorser" for "he" in the first line of the last sentence.

Sec. 67. Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

Sec. 68. As respects one another, indorsers are liable prima facie in the order in which they indorse;

Sec. 66.—75, 181, 185.
Sec. 67.—75, 183.
Sec. 68.—75, 164.

but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.

The following is substituted by Illinois for the last sentence: "All parties jointly liable on a negotiable instrument are deemed to be jointly and severally liable."

Sec. 69. Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section sixty-five of this Act, unless he discloses the name of his principal, and the fact that he is acting only as agent.

Illinois adds the following: "Section 69a. Whenever any bill of exchange, drawn or indorsed within this State and payable without this State, is duly protested for non-acceptance or non-payment, the drawer or indorser thereof, due notice being given of such non-acceptance or non-payment, shall pay such bill at the current rate of exchange and with legal interest from the time such bill ought to have been paid until paid, together with the costs and charges of protest, and on bills payable in the United States in case suit has to be brought thereon, and on bills payable without the United States with or without suit, five per cent damages in addition."

ARTICLE VI.—PRESENTMENT FOR PAYMENT

Sec. 70. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, pre-

Sec. 69.—186.
Sec. 70.—187, 188, 201, 205.

sentment for payment is necessary in order to charge the drawer and indorsers.

Illinois inserts: "except in the case of bank notes" after "but if the instrument."

In Kansas, New York and Ohio the words "and has funds there available for that purpose" are inserted after the word "maturity."

Wisconsin omits all of the first sentence after "on the instrument."

Sec. 71. Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

Nebraska omits all of this section after "reasonable time after its issue."

The Vermont Act substitutes: "after its issue in order to charge the drawer" for the last five words of the section.

New Hampshire adds the following: "Upon a promissory note payable on demand, a demand made at the expiration of sixty days from the date thereof, without grace, or at any time within that term, shall be deemed to be made within a reasonable time; and any act, neglect or other thing, which by the provisions of this act is deemed equivalent to a presentment and demand on a note payable at a fixed time, or which would dispense with such presentment and demand, if it occurs at or within the sixty days, shall be a dishonor thereof, and shall authorize the holder of the note to give notice of the dishonor to the indorser as upon a presentment to the promisor, and his neglect or refusal to pay the same. No presentment of the note to the promisor and demand for payment shall charge the indorser unless made on or before the last day of the sixty days."

In South Dakota the maturity of demand instruments is fixed by a new section, see section 193.

Sec. 71,—187, 201, 204, 205, 206, 207, 208, 233.

Sec. 72. Presentment for payment, to be sufficient, must be made—

1. By the holder, or by some person authorized to receive payment on his behalf;

2. At a reasonable hour on a business day;

3. At a proper place as herein defined;

4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.

Sec. 73. Presentment for payment is made at the proper place—

1. Where a place of payment is specified in the instrument and it is there presented;

2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;

3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;

4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

Sec. 74. The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

Sec. 75. Where the instrument is payable at a

Sec. 72.—208, 209, 226, 227, 311.
Sec. 73.—209, 210.
Sec. 74.—210, 229.
Sec. 75.—209, 211, 231.

bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

Nebraska omits everything after the words "banking hours."

Sec. 76. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if, with the exercise of reasonable diligence, he can be found.

Sec. 77. Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

Sec. 78. Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

Sec. 79. Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

Sec. 80. Presentment for payment is not required in order to charge an indorser where the in-

Sec. 76.—209, 212, 231.
Sec. 77.—209, 212, 231.
Sec. 78.—209, 213, 231.
Sec. 79.—214, 215.
Sec. 80.—214, 215.

strument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented.

Illinois omits everything after "for his accommodation."

Sec. 81. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

Sec. 82. Presentment for payment is dispensed with—

1. Where after the exercise of reasonable diligence presentment as required by this Act cannot be made;

2. Where the drawee is a fictitious person;

3. By waiver of presentment, express or implied.

Sec. 83. The instrument is dishonored by non-payment when—

1. It is duly presented for payment and payment is refused or cannot be obtained; or

2. Presentment is excused and the instrument is overdue and unpaid.

Sec. 84. Subject to the provisions of this Act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.

Sec. 85. Every negotiable instrument is payable

Sec. 81.—214, 215, 226.
Sec. 82.—66, 214, 216.
Sec. 83.—204, 219.
Sec. 84.—185, 220.
Sec. 85.—204, 220, 235, 311.

at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.

The Massachusetts Act amends this to read: "On all drafts and bills of exchange made payable within this commonwealth at sight, three days of grace shall be allowed, unless there is an express stipulation therefor to the contrary." New Hampshire makes the same provision.

The Rhode Island Act inserts "except sight drafts" after "every negotiable instrument."

In North Carolina the law provides that every negotiable instrument is payable at the time fixed therein without grace, except that "all bills of exchange payable within the state, at sight, in which there is an express stipulation to that effect and not otherwise, shall be entitled to days of grace as the same are allowed by the customs of merchants in foreign bills of exchange, payable at the expiration of a certain period after date on sight; provided, that no days of grace shall be allowed on any bill of exchange, promissory note or draft payable on demand."

Arizona, Kentucky and Wisconsin omit the sentence beginning "Instruments falling due" and the Vermont Act omits the third sentence up to "Instruments payable on demand."

The Washington Act omits everything after the second paragraph and adds: "Where the day or the last day of doing any act herein required or permitted to be done, falls upon Sunday or a holiday, the act may be done on the next succeeding secular or business day."

The North Carolina Act omits the third sentence beginning "Instruments falling due" and adds: "There shall be no difference between Saturday and any other secular or business day, as far as negotiable instruments are concerned."

Colorado substitutes: "Instruments falling due on any day,

in any place where any part of such day is a holiday, are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment during reasonable hours of the part of such day which is not a holiday."

The Minnesota Act adds: "And if presented after 12 o'clock noon on Saturday, when that entire day is not a holiday, may at the option of the payer be then paid."

In some states the words "or becoming payable" were added after "Instruments falling due" in the original act. In Arkansas, Indiana, Kansas, Minnesota, Missouri, New Jersey, New York and Virginia this insertion has been made by subsequent amendments.

The Massachusetts and New Hampshire Acts insert "or payable" after "falling due."

Section 85 has been adopted as part of the Iowa Act, but in addition, the following section has been adopted in that state: "Section 198. Days of Grace—demand made on. A demand made on any one of the three days following the day of maturity of the instrument, except on Sunday or a holiday, shall be as effectual as though made on the day on which demand may be made under the provisions of this act, and the provisions of this act as to notice of non-payment, non-acceptance, and as to protest shall be applicable with reference to such demand as though the demand were made in accordance with the terms of this act; but the provisions of this section shall not be construed as authorizing demand on any day after the third day from that on which the instrument falls due according to its face."

Sec. 86. Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

Sec. 87. Where the instrument is made payable at a bank it is equivalent to an order to the bank to

Sec. 86.—221.
Sec. 87.—28, 222.

pay the same for the account of the principal debtor thereon.

Illinois, Nebraska and South Dakota omit this section.

Minnesota and Georgia retain the section but substitute "it shall not be equivalent" for "it is equivalent."

In Missouri and New Jersey, by amendments in 1909, the following was added: "But where the instrument is made payable at a fixed or determinable future time, the order to the bank is limited to the day of maturity only."

Sec. 88. Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that the title is defective.

ARTICLE VII.—NOTICE OF DISHONOR

Sec. 89. Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

Sec. 90. The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given.

Sec. 91. Notice of dishonor may be given by an agent either in his own name or in the name of any

Sec. 88.—223.
Sec. 89.—225.
Sec. 90.—227.
Sec. 91.—227.

party entitled to give notice, whether that party be his principal or not.

Sec. 92. Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

Sec. 93. Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

Sec. 94. Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

In the Arkansas Act, after "receipt of such notice" the remainder of the section is as follows: "Himself must do so within the same time for giving notice as if the agent had been an independent holder."

Sec. 95. A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

Under the Kentucky Act, the notice must be written and signed.

Sec. 92.—227.
Sec. 93.—228.
Sec. 94.—228.
Sec. 95.—229.

The Kentucky and North Carolina Acts omit "the notice" after the word "vitiate."

Sec. 96. The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

The Kentucky Act omits "or merely oral."

Sec. 97. Notice of dishonor may be given either to the party himself or to his agent in that behalf.

Sec. 98. When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

Arkansas substitutes "must be sent by mail" for "may be sent."

Sec. 99. Where the parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution.

Sec. 100. Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

Sec. 101. Where a party has been adjudged a

Sec. 96.—229.
Sec. 97.—231.
Sec. 98.—231.
Sec. 99.—232.
Sec. 100.—232.
Sec. 101.—232.

bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

Sec. 102. Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this Act.

Sec. 103. Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.

2. If given at his residence, it must be given before the usual hours of rest on the day following.

3. If sent by mail, it must be deposited in the post office in time to reach him in usual course on the day following.

In Rhode Island subsection 2 reads: "If given at his residence it must be given before ten o'clock in the evening of the day following."

Sec. 104. Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times—

1. If sent by mail, it must be deposited in the post office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.

2. If given otherwise than through the post office, then within the time that notice would have

Sec. 102.—204, 233.
Sec. 103.—233.
Sec. 104.—235.

been received in due course of mail, if it had been deposited in the post office within the time specified in the last subdivision.

The Kansas, Nebraska and Ohio Acts substitute "next preceding paragraph of this section" for "last subdivision."

Sec. 105. Where notice of dishonor is duly addressed and deposited in the post office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

Sec. 106. Notice is deemed to have been deposited in the post office when deposited in any branch post office or in any letter box under the control of the post office department.

The Arkansas Act omits "when deposited," probably a mistake.

Sec. 107. Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

Sec. 108. Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows—

1. Either to the post office nearest to his place of residence, or to the post office where he is accustomed to receive his letters; or

2. If he live in one place, and have his place of business in another, notice may be sent to either place; or

Sec. 105.—236.
Sec. 106.—236.
Sec. 107.—237, 238.
Sec. 108.—238.

3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning.

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.

Sec. 109. Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied.

Sec. 110. Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.

Sec. 111. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor.

Sec. 112. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

Sec. 113. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the

Sec. 109.—240.
Sec. 110.—240.
Sec. 111.—241.
Sec. 112.—241.
Sec. 113.—241.

cause of delay ceases to operate, notice must be given with reasonable diligence.

Sec. 114. Notice of dishonor is not required to be given to the drawer in either of the following cases—

1. Where the drawer and drawee are the same person;

2. Where the drawee is a fictitious person or a person not having capacity to contract;

3. When the drawer is the person to whom the instrument is presented for payment;

4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;

5. Where the drawer has countermanded payment.

Sec. 115. Notice of dishonor is not required to be given to an indorser in either of the following cases—

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;

2. Where the indorser is the person to whom the instrument is presented for payment;

3. Where the instrument was made or accepted for his accommodation.

Sec. 116. Where due notice of dishonor by non-acceptance has been given, notice of a subsequent

Sec. 114.—66, 242, 243.
Sec. 115.—66, 243.
Sec. 116.—244.

dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

Sec. 117. An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

The Wisconsin Act adds "but this shall not be construed to revive any liability discharged by such omission."

Sec. 118. Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required except in the case of foreign bills of exchange.

Vermont adds to this section: "But the provisions of this section shall not be held to dispense with demand and notice of dishonor as provided by Sections 71 and 90."

ARTICLE VIII.—DISCHARGE OF NEGOTIABLE INSTRUMENTS

Sec. 119. A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor;

2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;

3. By the intentional cancellation thereof by the holder;

4. By any other act which will discharge a simple contract for the payment of money;

5. When the principal debtor becomes the holder

Sec. 117.—244.
Sec. 118.—245, 246, 247.
Sec. 119.—21, 255, 256.

of the instrument at or after maturity in his own right.

Illinois omits subsection 4.

Sec. 120. A person secondarily liable on the instrument is discharged—

1. By any act which discharges the instrument;

2. By the intentional cancellation of his signature by the holder;

3. By the discharge of a prior party;

4. By a valid tender of payment made by a prior party;

5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;

6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.

Illinois omits subsection 3.

Missouri adds to subsection 3: "Except when such discharge is had in bankruptcy proceedings."

Wisconsin adds a new subsection: "4a. By giving up or applying to other purposes collateral security applicable to the debt, or, there being in the holder's hands or within his control the means of complete or partial satisfaction, the same are applied to other purposes."

Illinois adds to subsection 5: "Or unless the principal debtor be an accommodating party."

In subsection 6 Illinois substitutes "an" for "any," adds "in favor of the principal debtor" after "agreement," inserts "prior or subsequent" after "assent," adds "or unless the prin-

Sec. 120.—21, 189, 259, 260, 268.

cipal debtor be an accommodating party" at the end of the subsection.

Wisconsin inserts "prior or subsequent" after "assent" in subsection 6 and adds the words "or unless he is fully indemnified" at the end of the subsection.

The Maryland and New York Act omit "unless made with the assent of the party secondarily liable, or" in subsection 6.

Sec. 121. Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except—

1. Where it is payable to the order of a third person, and has been paid by the drawer; and

2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

In Arkansas the last word is "accommodater"—probably a mistake or misprint.

Sec. 122. The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

Sec. 123. A cancellation made unintentionally, or under a mistake, or without the authority of the

Sec. 121.—185, 269.
Sec. 122.—269.
Sec. 123.—270.

holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.

Sec. 124. Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.

But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

In the Illinois Act the words "fraudulently or" (probably "and" was intended) are inserted before "materially" in the first sentence, and the words "by the holder" after "altered," in the same sentence.

Wisconsin inserts after "assented" the words "orally or in writing."

The South Dakota Act inserts "by the holder" after "altered" in the first paragraph.

Sec. 125. Any alteration which changes—

1. The date;

2. The sum payable, either for principal or interest;

3. The time or place of payment;

4. The number or the relations of the parties;

5. The medium or currency in which payment is to be made;

Or which adds a place of payment where no place

Sec. 124.—163, 272.
Sec. 125.—20, 163, 271.

of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

Title II—Bills of Exchange

ARTICLE I.—FORM AND INTERPRETATION

Sec. 126. A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

Sec. 127. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

Sec. 128. A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.

Wisconsin omits the words "or in succession."

Sec. 129. An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

Sec. 126.—7, 14, 28, 29, 30, 31, 278.
Sec. 127.—282, 326.
Sec. 128.—46, 283.
Sec. 129.—247, 283.

Sec. 130. Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

Wisconsin omits the words "or a person."

Sec. 131. The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit.

ARTICLE II.—ACCEPTANCE

Sec. 132. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

Sec. 133. The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and, if such request is refused, may treat the bill as dishonored.

Sec. 134. Where an acceptance is written on a paper other than the bill itself, it does not bind the

Sec. 130.—66, 296.
Sec. 131.—297.
Sec. 132.—297.
Sec. 133.—61, 297, 300.
Sec. 134.—176, 298.

acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.

Illinois and South Dakota omit the words "to whom it is shown and."

Sec. 135. An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

Illinois inserts "or after" after "before."

Sec. 136. The drawee is allowed twenty-four hours after presentment, in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as of the day of presentation.

Sec. 137. Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

This section is omitted in Illinois and South Dakota.
Wisconsin adds: "Mere retention of the bill is not an acceptance."

Sec. 138. A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subse-

Sec. 135.—176, 299, 302, 378.
Sec. 136.—302.
Sec. 137.—302, 303.
Sec. 138.—71, 304, 305.

quently accepts it, the holder, in the absence of any different agreement is entitled to have the bill accepted as of the date of the first presentment.

In South Dakota the word "payable" is inserted before "accepted" in the second sentence—evidently an errcr.

Sec. 139. An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

Sec. 140. An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere.

Sec. 141. An acceptance is qualified, which is—

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated;

2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;

3. Local, that is to say, an acceptance to pay only at a particular place;

4. Qualified as to time;

5. The acceptance of some one or more of the drawees, but not of all.

Sec. 142. The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is

Sec. 139.—176, 305.
Sec. 140.—176, 305.
Sec. 141.—176, 306.
Sec. 142.—176, 306, 307.

taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto.

ARTICLE III.—PRESENTMENT FOR ACCEPTANCE

Sec. 143. Presentment for acceptance must be made—

1. Where the bill is payable after sight, or in any other case, where presentment for acceptance is necessary in order to fix the maturity of the instrument; or
2. Where the bill expressly stipulates that it shall be presented for acceptance; or
3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

Sec. 144. Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so, the drawer and all indorsers are discharged.

Sec. 143.—176, 308.
Sec. 144.—176, 309.

Sec. 145. Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and—

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only;

2. Where the drawee is dead, presentment may be made to his personal representative;

3. Where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

Sec. 146. A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock, noon, on that day.

Arizona, Kentucky and Wisconsin omit the last sentence.

North Carolina omits the last sentence and substitutes: "There shall be no difference between Saturday and any other secular or business day, as far as negotiable instruments are concerned."

Colorado amends the same section by omitting last sentence and substituting: "When any day is in part a holiday, presentment for acceptance may be made during reasonable hours of the part of such day which is not a holiday."

Sec. 145.—176, 310.
Sec. 146.—176, 311.

Sec. 147. Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawers and indorsers.

Sec. 148. Presentment for acceptance is excused, and a bill may be treated as dishonored by non-acceptance, in either of the following cases—

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill.

2. Where, after the exercise of reasonable diligence, presentment cannot be made.

3. Where, although presentment has been irregular, acceptance has been refused on some other ground.

Sec. 149. A bill is dishonored by non-acceptance—

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or

2. When presentment for acceptance is excused, and the bill is not accepted.

Sec. 150. Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as

Sec. 147.—176, 214, 215, 216, 311.
Sec. 148.—176, 312.
Sec. 149.—176, 312.
Sec. 150.—250, 305, 309, 312, 313.

dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

Sec. 151. When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary.

ARTICLE IV.—PROTEST

Sec. 152. Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

Sec. 153. The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify—

1. The time and place of presentment;
2. The fact that presentment was made and the manner thereof;
3. The cause or reason for protesting the bill;
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

Sec. 151.—168, 312, 313.
Sec. 152.—246, 247.
Sec. 153.—248.

Sec. 154. Protest may be made by—

1. A notary public; or

2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

Arkansas substitutes "responsible" for "respectable" in subsection 2.

Sec. 155. When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

Sec. 156. A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business, or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

Sec. 157. A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

Sec. 158. Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

Sec. 154.—248.
Sec. 155.—249.
Sec. 156.—249.
Sec. 157.—250.
Sec. 158.—250.

Sec. 159. Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

Sec. 160. When a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

ARTICLE V.—ACCEPTANCE FOR HONOR

Sec. 161. Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security, and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

Sec. 162. An acceptance for honor supra protest must be in writing, and indicate that it is an accept-

Sec. 159.—251.
Sec. 161.—251.
Sec. 162.—251.

ance for honor, and must be signed by the acceptor for honor.

Sec. 163. Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

Sec. 164. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

Sec. 165. The acceptor for honor, by such acceptance engages that he will, on due presentment, pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.

Sec. 166. Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

Sec. 167. Where a dishonored bill has been accepted for honor supra protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

Sec. 168. Presentment for payment to the acceptor for honor must be made as follows—

Sec. 163.—251.
Sec. 164.—251.
Sec. 165.—251.
Sec. 166.—251.
Sec. 167.—251.
Sec. 168.—251.

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity.

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and four.

The North Carolina Act substitutes the words "in this chapter specified" for "section one hundred and four" in subsection 2.

Sec. 169. The provisions of section eighty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

Sec. 170. When the bill is dishonored by the acceptor for honor, it must be protested for non-payment by him.

ARTICLE VI.—PAYMENT FOR HONOR

Sec. 171. Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

Sec. 172. The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor, which may be appended to the protest or form an extension to it.

Sec. 169.—251.
Sec. 170.—251.
Sec. 171.—251.
Sec. 172.—251.

Sec. 173. The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

Sec. 174. Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

Sec. 175. Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

Sec. 176. Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.

Sec. 177. The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

ARTICLE VII.—BILLS IN A SET

Sec. 178. Where a bill is drawn in a set, each part of the set being numbered and containing a ref-

Sec. 173.—251.
Sec. 174.—251.
Sec. 175.—251.
Sec. 176.—251.
Sec. 177.—251.
Sec. 178.—253.

erence to the other parts, the whole of the parts constitutes one bill.

Sec. 179. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

Sec. 180. Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

Sec. 181. The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

Sec. 182. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

Sec. 183. Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

Sec. 179.—253.
Sec. 180.—253.
Sec. 181.—253.
Sec. 182.—253.
Sec. 183.—253.

Wisconsin adds: "Sec. 1682. Whenever any bill of exchange drawn or indorsed within this State and payable without the limits of the United States shall be duly protested for non-acceptance or non-payment, the party liable for the contents of such bill shall, on due notice and demand thereof, pay the same as the current rate of exchange at the time of the demand and damages at the rate of five per cent upon the contents thereof, together with interest on the said contents to be computed from the date of the protest; and said amount of contents, damages and interest shall be in full of all damages, charges and expenses.

"Sec. 1683. If any bill of exchange drawn upon any person or corporation out of this State, but within some State or territory of the United States, for the payment of money shall be duly presented for acceptance or payment and protested for non-acceptance or non-payment, the drawer or indorser thereof, due notice being given of such non-acceptance or non-payment, shall pay said bill with legal interest, according to its tenor and five per cent damages, together with costs and charges of protest."

Title III.—Promissory Notes and Checks

ARTICLE I.

Sec. 184. A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

In Georgia, section 184 reads as follows: "A negotiable promissory note made within the meaning of this Act is an unconditional promise in writing made by one person to

Sec. 184.—14, 25, 34.

another signed by the maker engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money or in cotton or other articles of value, to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him. If it is made payable in articles of value other than money, and payment is not punctually made the holder may recover the value of such articles at the time the note was due, at the place where it was payable, if a specific place is mentioned, otherwise at the place where it was made, with lawful interest thereon."

Sec. 185. A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

Sec. 186. A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

In the Illinois Act, after the word "issued," there is inserted: "and notice of dishonor given to the drawer as provided for in the case of bills of exchange."

Sec. 187. Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance.

Sec. 188. Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.

Sec. 189. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable

Sec. 185.—15, 25, 29, 30, 31, 314, 316.
Sec. 186.—225, 315.
Sec. 187.—318.
Sec. 188.—318, 319.
Sec. 189.—325, 326, 351, 353.

to the holder, unless and until it accepts or certifies the check.

Title IV.—General Provisions

ARTICLE I.

Sec. 190. This act shall be known as the Negotiable Instruments Law.

Arizona, Connecticut, District of Columbia, Kentucky, Massachusetts, Nebraska, New Hampshire, North Carolina, Ohio, Rhode Island and Wisconsin omit this section.

Sec. 191. In this act, unless the context otherwise requires—

"Acceptance" means an acceptance completed by delivery or notification.

"Action" includes counter-claim and set-off.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means negotiable promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery.

"Instrument" means negotiable instrument.

Sec. 190.—106.
Sec. 191.—25, 139.

"Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print.

Sec. 192. The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable.

Kansas omits the last sentence.

Sec. 193. In determining what is a "reasonable time" or an "unreasonable time," regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

South Dakota adds:

"A. The apparent maturity of a bill of exchange, payable at sight, or on demand, is:

1. If it bears interest, one year after its date; or
2. If it does not bear interest, ten days after its date, in addition to the time which would suffice, with ordinary diligence, to forward it for acceptance.

"B. The apparent maturity of a promissory note, payable at sight or on demand, is:

1. If it bears interest, one year after its date; or
2. If it does not bear interest, six months after its date."

Sec. 194. Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

Sec. 194.—234.

Sec. 195. The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof.

Arizona and Georgia omit this section.

Sec. 196. In any case not provided for in this act the rules of the law merchant shall govern.

Kentucky omits this section.

Sec. 197. Of the laws enumerated in the schedules hereto annexed that portion specified in the last column is repealed.

Sec. 198. This chapter shall take effect on

This is the last section of the act as originally drawn. New York adds as a last section to its act: "No banks shall be liable to a depositor for the payment by it of a forged or raised check, unless within one year after the return to the depositor of the voucher of such payment, such depositor shall notify the bank that the check so paid was forged or raised."

Similar statutes, not amendments to the Negotiable Instruments Law, have been enacted in the following States: Wisconsin, California, South Dakota, Michigan, Washington, Oregon, New Jersey, Iowa, Montana, North Carolina, North Dakota, Wyoming, Idaho, Kansas, Maine, Minnesota, Ohio, Louisiana, Massachusetts and Rhode Island.

Sec. 196.—8, 13, 222.

TABLE OF CASES

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